IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM 1973

JACK M. GRAY, JOHN JACOB BOBO,
WILLIAM DUWARD McEWEN and PAUL GOLDBERG,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI:

Petitioners JACK M. GRAY, JOHN JACOB BOBO, WILLIAM DUWARD McEWEN and PAUL GOLDBERG, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals, for the Fourth Circuit decided and entered April 23, 1973 and an order of the Court entered on or about June 5, 1973, denying the petitioners' motion for a rehearing of the appeal in that Court all of which affirmed the judgment of conviction rendered against the petitioners in the United States District Court for the District of South Carolina, Greenville Division, on August 20, 1971. The said petitioners JACK M. GRAY and JOHN JACOB BOBO were convicted for a violation of Section 1952 18 U.S.C. (the use of mail and telephone facilities and other

instrumentalities in interstate commerce with an intent to promote, manage, establish and carry on an illegal activity, namely, a business enterprise involving gambling in violation of the Laws of the State of South Carolina). The petitioners JACK M. GRAY, JOHN JACOB BOBO, WILLIAM DUWARD McEWEN and PAUL GOLDBERG were all convicted of conspiracy to conduct, manage, supervise, finance, direct or own an illegal gambling business involving five or more persons within the meaning of 18 U.S.C. 1955 in violation of 18 U.S.C. 371.

OPINION BELOW

The orders appealed from and the decision and opinion of the said United States Court of Appeals, Fourth Circuit, are reprinted herein in Appendix A (A-1). The order denying the rehearing is reprinted herein in Appendix B (B-1). This opinion is contained in *United States of America v. John Jacob Bobo, Jack M. Gray, William Duward McEwen and Paul Goldberg*, not as yet reported.

JURISDICTION

The order and opinion of the United States Court of Appeals is dated April 23, 1973. The order denying a motion for a rehearing of the appeal is dated June 5, 1973. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257 (3) and Rule 22 (2) of the Rules of the Supreme Court of the United States. As hereinabove described, the judgment sought to be reviewed is dated April 23, 1973 and the order denying a rehearing of the appeal is dated

June 5, 1973. An order of the Honorable Warren Earl Burger, Chief Justice of the United States Supreme Court, enlarging petitioners' time to file this petition for certiorari was granted July 2, 1973 and the said time enlarged was to August 5, 1973.

QUESTIONS INVOLVED

1. Were the provisions of 18 U.S.C. 2516(1) and 2518(a) adhered to in this case, in respect to the statutory requirement that the Attorney General of the United States or such other official described in said statutes, initially authorized the U.S. Attorney to apply to the appropriate court for a warrant allowing the wire tapping?

2. Was there probable cause underlying the granting of the wire-tap warrants?

3. Was there sufficient evidence underlying the conspiracy under 18 U.S.C. 371 where there was no proof that the petitioners intended to violate Section 1955 of 18 U.S.C., and there was no overall group conducting the gambling enterprise as contemplated by Section 1955 as aforesaid and further was Section 371 applicable where Section 1955 required five or more persons be parties to the gambling business described in said section?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV

SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V

". . . ; due process; . . ."

". . .; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; . . ."

AMENDMENT VI

"Jury Trial for Crimes, and Procedural Rights"

"In all criminal prosecutions, the accused . . .; to be confronted with witnesses against him . . ."

18 U.S.C. 371

CONSPIRACY TO COMMIT OFFENSE, OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy. . . .

18 U.S.C. SECTION 2515

"PROHIBITION OF USE AS EVIDENCE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS"

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. SECTION 2516

"AUTHORIZATION FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS"

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with Section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of — . . ."

18 U.S.C. SECTION 2518

"PROCEDURE FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS"

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application; . . ."

18 U.S.C. SECTION 1952

"INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES"

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) . . .; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, . . .

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, . . ."

18 U.S.C. SECTION 1955

"PROHIBITION OF ILLEGAL GAMBLING BUSINESSES"

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all of part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision of which it is conducted;

(ii) involves five or more persons who conduct

finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy bolita or numbers games, or selling chances therein. . . ."

SECTION 16-515 OF THE STATUTORY LAWS OF THE STATE OF SOUTH CAROLINA

"Any person within this State who engages in bookmaking with or without writing at any time or place, any person who keeps or occupies any room, building, or any part thereof, or occupies any place or stand or any kind upon any public or private grounds within this State, with books, papers, apparatus or paraphernalia for the purpose of recording or registering bets or wagers; any person who records or registers bets or wagers, or makes book with or without writing upon the result of any trial or contest of speed, skill, or power of endurance of man or beasts; any person who receives, registers, records, or forwards, or purports or pretends to receive, register, record or forward in any manner whatsoever any money, thing or consideration of value, bet or wager or offered for the purpose of being bet or wagered by or for any persons; any person who wagers, abets, assists in any manner in any of the aforesaid acts which are hereby forbidden, violates the laws of the State of South Carolina."

STATEMENT OF THE CASE

This case had its inception when the government procured a wire tap warrant on December 8, 1970 from the Honorable Robert Martin, Jr., a Judge of the United States District Court, District of South Carolina, at Columbia, South Carolina. The warrant was granted upon the affidavit of a

federal agent named Roger J. Fontanella who was designated as a Special Agent of the Federal Bureau of Investigation. The affidavit was verified December 8, 1970 and was accompanied by the written application of Joseph O. Rogers, Jr., the U.S. Attorney for South Carolina. His application was dated December 8, 1970. There was also submitted a letter of the Department of Justice dated December 3, 1970 purportingly having the signature of one Will Wilson, Assistant Attorney General.

The verified application of the U.S. Attorney was based mainly on the agent's affidavit which contained a factual basis for the application.

The agent's affidavit alleged that BOBO, McEWEN, GOLDBERG and SMITH of Charleston, South Carolina, together with unknown others, were committing or about to commit offenses involving illegal gambling in violation of 18 U.S.C. 2516, 1084, 1952, 1955 and 371. The agent claimed that his experience showed that records previously seized in gambling investigations, were not sufficient to establish the interstate nature of the crime and were difficult to interpret; that such records were of no significance without further knowledge of a gambler's activities. The agent further claimed that the surveillance of gambling operations were ineffective. Consequently, the agent concluded that normal investigative procedures were useless and that wire tapping was required.

The agent then listed telephone numbers 244-0928 and 244-0966 listed in the name of the petitioner GRAY. The agent described the mechanics of the bookmaking business which included "laying-off bets" with other bookmakers. "Laying-off" was explained as sharing the risk or reinsuring

the risk a bookmaker would incur. Also included as an element of the gambling business, the agent avered, was the procuring of a "line". This was described as the "point-spread" or odds. Through similar investigations in South Carolina, the agent claimed that a South Carolina bookmaker would contact out-of-state persons to effectuate the "lay-off" and to procure the "line".

Under a heading in the affidavit designated "facts and circumstances" the agent referred to a number of confidential informants, one being an admitted gambler. The first informant on May 8, 1970, advised him that GRAY with BOBO were bookmakers in Spartenburg, South Carolina; that GRAY had two telephones at his home having telephone numbers 244-0928 and 244-0966 which GRAY utilized for bookmaking; that GRAY used them to contact New York persons for the purpose of procuring the "line" and "laying-off" bets and that he would thereafter give the "line" to BOBO. Similar hearsay was given to the agent from informant number 1 on May 8, 1970, July 22, 1970, August 7, 1970, and September 3, 1970. This hearsay from the informant number 1 was to the effect that GRAY was in New York and returned to South Carolina to gamble and was associated with BOBO to whom he gave the line and also laid off bets from; GRAY would continue to get the line from New York and relay information to BOBO calling him at number 583-9871 and 583-2503. There was similar hearsay from informant number 1 to the agent on October 28, 1970 and December 12, 1970 (7).

To establish the informant's reliability the agent alleged that the informant was known to the Federal Bureau of Investigation for three (3) years and was contacted on a

regular basis for the past year.

It was further alleged in regard to the informant's reliability, that the informant's hearsay in the past was established by independent investigations of the Federal Bureau of Investigation.

The informant also described certain hearsay from informant number 2. In this connection, toll records procured from the telephone company in regard to GRAY's telephone, disclose calls over GRAY's telephone to telephone numbers 914-793-1281, 914-793,1410. Informant number 2 advised another FBI agent of a bookmaking operation in Yonkers, New York and that the telephone numbers were as hereinabove described. Part of the informant's hearsay was based on other hearsay.

To establish the reliability of informant number 2, the agent alleged that the FBI contacted him for the past two and a half (2-1/2) years and that the informant was instrumental in the authorities procuring past convictions.

Informants number 3, 4, 5 and 6 allegedly advised in April and October of 1970 about certain persons in New York and their gambling activities.

Informant number 7, advised the authorities that BOBO was engaged in bookmaking at designated premises, and that BOBO had two telephones in such location having numbers 583-2503 and 583-9871. Informant number 7 "advised" that he called BOBO on these two telephones for "line" information and that BOBO showed him the telephone bill for the two phones. They were listed in the name of Thomas D.

Steadman and that BOBO used that name. On July 7, 1970, informant number 7 further "advised" that BOBO moved the bookmaking business from 1481-1/2 Ashville Highway to 989-1/2 Ashville Highway. The agent then avered further that on July 16, 1970 informant number 7 advised that BOBO moved from 989-1/2 Ashville Highway to 955 Howard Street, Spartenburg, South Carolina. On July 21, 1970 informant number 7 "advised" that he was in BOBO's new place of business five or six times and that was located at 955 Howard Street. BOBO told him that his business was thriving. Informant number 7 also relayed to the agent that BOBO made long distance calls to Greenville, South Carolina for the "line" and received calls from "Jack", that BOBO "saw Jack" to "lay-off bets". Informant number 7 learned from another bookmaker that BOBO did business with GRAY and that BOBO was one of the largest bookmakers in South Carolina and it was estimated by the informant who relayed this to informant number 7 that BOBO transacted over two million ($2,000,000.00) dollars business a year. On August 24, 1970 and November 12, 1970 this same informant designated as number 7 similarly advised the agent.

The reliability of informant number 7 was claimed because he had been known to the FBI for two years and contacted on a regular basis for one and one-half (1-1/2) years. That he furnished information concerning numerous gambling activities that took place in the Spartenburg area of South Carolina; that the information furnished by this informant led to one federal arrest and one arrest by local authorities.

There was further alleged the police dosier of BOBO — eight past convictions for gambling charges.

The agent then referred to an informant designated as

number 8 who was allegedly a member of the gambling establishment of Charleston, South Carolina. He "advised" another agent named Logan who told Fontanella that GOLDBERG, SMITH and McEWEN were and are currently operating a bookmaking business at 476 King Street under the name of Uptown Sports Center, using telephone numbers 723-6010 and 723-7420 to accept wagers and get the "line" as well as give the "line". Informant number 8 told the agent that McEWEN got 50% of the proceeds of the business and the other two got 25% respectively. On October 3, 1970 informant number 8 "advised" the agent that these three persons handled over One Hundred Thousand ($100,000.00) Dollars worth of gambling; on November 24, 1968 informant number 8 further advised the agent that McEWEN, GOLDBERG and SMITH were "considered" to operate the biggest bookmaking business in Charleston, South Carolina, and that GOLDBERG and SMITH had mentioned that they had handled close to One Hundred Thousand ($100,000.00) Dollars worth of gambling business during the past few weeks; further, that on November 24, 1969 source number 8 advised the agent through conversations with GOLDBERG and SMITH that he "determined" that McEWEN's gambling operation handled several hundred thousand dollars worth of gambling business during any week and that they got their line daily and sometimes twice a day. Two months later on January 16, 1970 source number 8 advised Logan the other agent who told Fontanella that "he had determined through a conversation with GOLDBERG and SMITH" that BOBO was furnishing the line to GOLDBERG, SMITH and McEWEN, that GOLDBERG, SMITH and McEWEN furnished the "line" to other gamblers and bettors in South Carolina; and that GOLDBERG Utilized telephone number 723-6010 to call BOBO at Spartenburg, South Carolina for the line and used

the telephone to give BOBO "lay-offs". On September 4, 1970 source number 8 stated he saw GOLDBERG, SMITH and McEWEN use the above described telephones to obtain the "line" and accept bets. Further source number 8 placed bets with those three persons.

The same informant number 8 described further operations and that GOLDBERG told him he got the line from "BOBO" and that "BOBO" got the lines from another bookmaker. Number 8 further advised that the line originated in New York. Number 8 also claimed that he heard GOLDBERG and SMITH accept bets over the telephone.

It is further alleged that source number 8 furnished reliable information to the FBI since May 1969 and was contacted on at least 25 separate occasions; that source number 8 furnished information that on one occasion led to direct apprehension of a federal fugitive; that information furnished by this informant was obtained through personal conversations with and observations of McEWEN, SMITH and GOLDBERG.

Recourse was also had to an informant known as source number 9 who on October 27, 28 and November 5, 1970 "advise " that McEWEN, SMITH and GOLDBERG continued to operate a large bookmaking business at the aforementioned address, and to utilize the telephones hereinabove described. Number 9 "stated" that SMITH and GOLDBERG both stated they obtained their line information from BOBO and that BOBO got his line from another bookmaker in Greenville, South Carolina; number 9 also allegedly "stated" that he personally observed McEWEN, GOLDBERG and SMITH accept bets and obtain "the line", over the aforementioned telephones. On November 14, 1969 number 9 advised another

agent named Logan who told Fontanella that GOLDBERG, SMITH and McEWEN continued to operate "the largest gambling operations" in Charleston at Uptown Sports Center, 476 King Street, Charleston. Number 9 also "stated" that GOLDBERG and SMITH Handled most of the bets and handled "the line information"; on October 15, 1970 number 9 "advised" that McEWEN, GOLDBERG and SMITH are currently obtaining their line from BOBO and that GOLDBERG and SMITH called BOBO for the "line"; it was further alleged that number 9 had been furnishing reliable information to the authorities since January 1969 and was contacted on numerous occasions; that the information furnished by this source was verified through the independent investigation of federal agents and that investigation showed that the information was accurate and reliable and resulted in the apprehension and conviction of persons violating the federal gambling laws; that the hearsay from this informant was obtained by such informant through personal conversations with and observations of McEWEN, SMITH and GOLDBERG. Set forth in Appendix D (p. D-1) is a letter dated December 3, 1970 bearing the signature "Will Wilson". That letter accompanied the application for the wire tap warrant. The letter which has stamped on it the date December 3, 1970 and is on the stationery of the Department of Justice, was addressed to the United States Attorney for the District of South Carolina. The prefatory paragraph recounted the request for authorization to make an application for the wire tap warrant in this case. It stated "I have reviewed your request" and then went on to say that probable cause existed as to the named subjects.

The letter concludes with an opening sentence that:

"Accordingly, you are hereby authorized under the powers specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, . . .".

The appendix shows also that on December 8, 1970 at approximately 1:30 P.M. the agent appeared before the Honorable J. Robert Martin, the Judge of the United States District Court, District of South Carolina, Greenville Division, and that a hearing was held in regard to the application. The agent was questioned by the United States Attorney. The questioning was to the effect that on December 6, 1970 Fontanella contacted informant number 1 who advised him that GRAY was continuing to obtain line information from unknown individuals in New York and was furnishing the line to BOBO. Source number 7 also told the agent that BOBO was continuing to run the bookmaking business at 955 Howard Street and that this informant contacted BOBO on a daily basis to get a line. Fontanella upon further being questioned testified that on December 3, 1970 another federal agent named Logan advised him that he contacted source number 8 who told him that McEWEN, GOLDBERG and SMITH continued to operate the bookmaking operation at the aforementioned address and utilized the subject telephone numbers; that this informant advised that he was personally at the premises in December 1970 and saw and observed line information sheets and other records; that McEWEN, GOLDBERG and SMITH continued to get their line information from BOBO. The Court did not ask the agent any questions. However, the Court stated:

"THE COURT: I know it to be a fact; however, I don't believe your record reflects that you have in fact received a prerequisite authority from the Attorney General."

"MR. ROGERS: Your Honor, that was attached to my application.

"THE COURT: I got you. I just wanted to be sure it was reflected in the record that that is before the Court prior to the execution of any order."

Thereafter and utilizing the wire tap warrants in this case, the authorities procured a quantity of search warrants. The first search warrant dated January 14, 1971 was based on the fruits of the wire tapping and was directed to the petitioners at their respective addresses. Thus there was a search warrant granted on January 14, 1971 authorizing a search of BOBO; the search warrant authorizing a search of the premises at 955 Howard Street, Spartensburg, South Carolina; a search warrant granted January 14, 1971 authorizing a search of the petitioner GRAY and a search of the premises occupied by GRAY. And also a search warrant was directed for GRAY's car.

A search warrant dated January 19, 1971 was granted and the subject was the petitioner McEWEN and also a search warrant authorized seizure of McEWEN's 1969 Pontiac car; a search warrant for the Uptown Sports Center, 476 King Street, Charleston, South Carolina; a safety deposit box in the Citizens and Southern National Bank of South Carolina in Charleston, South Carolina in McEWEN's name and finally a search warrant for the petitioner GOLDBERG.

At the initial hearing in the trial court to suppress the evidence seized under the wire tap warrants and the consequent search warrants, an issue was raised as to identity of informant number 1. It will be recalled that informant number 1 "advised" Fontanella, the agent who submitted his

affidavit for the wire tap warrants, about GRAY. At the hearing Fontanella, the agent, testified that he was personally acquainted with informant number 1 and that informant number 1 told him that GRAY was a bookmaker. Petitioner's counsel then presented an affidavit which was executed by a person who was designated as source number 1. This affidavit alleged that he never told Fontanella that petitioner GRAY was a bookmaker. To establish that informant number 1 was the same person who executed the affidavit submitted at the hearing, the Court was requested to ask Fontanella, the agent, *in camera* the name of source number 1.

At the hearing to suppress, Fontanella, the agent who submitted the affidavit for the wire tap warrants, admitted on cross examination that while he had contact with source number 1 prior to the investigation of this case, number 1 never furnished any information that led to convictions.

In support of the government's position, the following was presented:

(a) a letter dated December 3, 1970 bearing the signature of "Will Wilson, Assistant Attorney General" (see Appendix D, p. D-1);

(b) an affidavit of Will Wilson dated September 15, 1971 (Appendix E, p. E-1);

(c) an affidavit of Henry Peterson dated February 15, 1972 (Appendix F, p. F-1);

(d) an affidavit of the then Attorney General of the United States, John N. Mitchell, dated February 18, 1972 (Appendix

authorized" all applications for electronic surveillance.

It was further admitted by this agent that source number 7 in referring to Mr. GRAY, did so in name only, because number 7 did not know Mr. GRAY. It was noted that an agent named Logan who helped Fontanella in the investigation had personal contact with informant number 1.

While Agent Fontanella never discussed with any informant involved the possibility that such informant or informants would be called to testify, he was of the opinion, based on other sources and general knowledge, that the informants would not be willing to testify. The Court then indicated that the Court was helpless even if there was a fraud perpetrated on the Court, stating that it could do nothing in the light of the execution of the warrants and what was "turned up".[1]

Counsel then pointed out that if there was fraud on the part of the informants the affidavits underlying the warrants would lack credibility. Then the Court indicated that the defense would have to show that the agents were a party to the fraud.

After the case was tried, and the petitioners convicted, the decision in *U.S. v. Robinson*, 468 F.(2) 189 (Cir. 5th, 1972) was decided. The holding there was against the government. The decision held that a wire tap warrant was void because the initial approval for the institution of the wire tap application, was a letter from a person named Will Wilson an

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1. This would seem to contradict this Court's holding in *Beck v. Ohio*, 379 U.S. 89, 13 L ed 2d 142, 85 S.Ct. 223 (1964).

official of the Department of Justice. However, it next appeared that one Henry Peterson, another official of the Department of Justice, signed Will Wilson's name. Because of this decision, the Court of Appeals remanded the case to the Trial Court for a new hearing. Consequently, petitioners are constrained to present to the Court the issues developed at this phase of the reheard motion to suppress.

By affidavit verified February 14, 1972 (Appendix H, p. H-1) Sol Lindenbaum alleged that he was the Executive Assistant to the Attorney General of the United States; that on December 3, 1970 the Attorney General approved a request for an authorization to make an application in regard to the telephones in Greenville, Spartenburg and Charleston, South Carolina; that attached to his affidavit was the Attorney General's "personally initialed memorandum" to Will Wilson reflecting approval.

The opinion and decision of the District Court denying the application for suppression after the matter was remanded is found in Appendix C (p. C-1).

The facts adduced at trial and also found by the Court of Appeals show that GRAY and Segan dealt with BOBO and Kirkland; Porter dealt with GRAY. These were the immediate contacts that GRAY had. GRAY did not deal with McEWEN and GOLDBERG. Thus, the factual pattern clearly showed that GRAY and Segan were one distinct enterprise. Porter also dealt with GRAY but did not deal with Kirkland, McEWEN and GOLDBERG' The latter three were a separate and distinct enterprise.

REASONS FOR GRANTING THE WRIT

A troublesome question has arisen in various circuits and District Courts as to the manner in which Section 2516(1) of 18 U.S.C. is to be conformed to. That section in part provides:

> "2516 Authorization for Interception of Wire or Oral Communications.—(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge . . . , and such judge may grant in conformity to Section 2518 of this chapter an order . . ."

See *U.S. v. Focarile*, 340 F.Supp. 1033, aff'd Sub. Nom.; *U.S. v. Giordano*, 469 F.2d 522 (Cir. 4th, 1972); Cert. granted *U.S. v. Giordano*, 41 U.S. Laws Week 3513. The issue posed in the application for certiorari by the United States is:

> "Electronic surveillance application that was not signed by either Attorney General of the United States or designated Assistant Attorney General did not satisfy authorization requirements in 18 U.S.C. 2516 even though it was signed by Attorney General's Executive Assistant, who purportedly was carrying out department policy created by Attorney General."

In this case, accompanying the initial wire tap application for the warrant, was an authorization allegedly

signed by "Will Wilson" (Appendix D, p. D-1).

In the warrant itself, was the finding that "Will Wilson" was specifically designated to authorize the application. Yet, concededly, Will Wilson never signed the letter of authorization. Instead, Henry Peterson did. Peterson in his affidavit of February 15, 1972, admitted that Wilson never examined the file or authorized the application.

Consequently, at the time the warrant was granted an improper party was designated therein as the official who could and did authorize the application. Section 2518 of 18 U.S.C. in its relevant portions provides as follows:

> "Procedure for Interception of Wire or Oral Communications. – (1). Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge...and shall state the applicant's authority to make such application. Each application shall include the following information: (a) the identity of the investigative or law enforcement officer making the application and the officer authorizing the application;"

Nor did the allegations supplied on the remand of this particular phase in the appeal of the Court below, render the order valid.

As was stated in *State v. Graziano* (Court of Special Appeals of Maryland) 301 A 2d 36 at page 38, 17 Md. App. 276

"It has been firmly established in this State that the Court's consideration of the showing of probable cause must be confined to the affidavit alone. No evidence may be received outside the four corner of the affidavit either to show the existence of probable cause or to controvert the truth of the allegations therein..."

As was stated in *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 28 L. Ed. 2d 306, 91 S.Ct. 1031 (1971), footnote number 8:

"...under the cases of this court, an otherwise insufficient affidavit can not be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. See Aguilar v. Texas, 378 U.S. 108, 109, ... A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless."

To put it another way, the government in effect disavowed that portion of the original wire tap application which designated "Will Wilson" as the proper official who authorized the application, Deputy Assistant Attorney General Henry Peterson, and Executive Assistant Sol Lindenbaum has substituted Former Attorney General Mitchell. This aggravated the situation, for where an application for a warrant is insufficient on its face, a magistrate can then and there determine the propriety of it. In this case, assuming the application proper on its face, the court granting the warrant was actually misled.

Prior to the signing the wire tap warrants in this case, the prosecution went before the judge that ultimately granted the warrant. In addition to the affidavits and the letter of authorization of Will Wilson, there was also an *ex parte*

hearing before the judge where the agent was examined. As part of that hearing, the following transpired:

> "THE COURT: ...; however, I don't believe your record reflects that you have in fact received a prerequisite authority from the Attorney General.
>
> MR. ROGERS: Your honor, that is attached to my application.
>
> THE COURT: I got you. I just wanted to be sure it was reflected in the record that that is before the Court prior to the execution of any order."

This of course referred to the December 3, 1970 letter of Will Wilson addressed to the United States Attorney and which is found in Appendix D.

In *U.S. v. Robinson,* 468 F. 2d 189 (Cir. 5th, 1972), rehearing en Banc granted July 21, 1972, it was held that Section 2516(1) of 18 U.S.C. was not complied with when Lindenbaum approved Will Wilson as being the person to authorize the application; Lindenbaum acting pursuant to an authorization by the Attorney General. Peterson, signed the "Will Wilson" letter of authorization. See also *U.S. v. Robinson* on remand, 13 Criminal Law Reporter 2003, 2004, remand being granted in *U.S. v. Robinson,* 472 F. 2d 973 (Cir. 5th 1973).

In *U.S. v. Focarile, supra,* 340 F.S. 1033 (U.S.D.C. Md. 1972) it was stated on page 1057 that:

> "The statutory scheme therefore sets up a two-step process. First, the application for the wire tap must be authorized by the Attorney General or by an Assistant Attorney General specifically granted authority to act by

the Attorney General. Second, the identity of the person who authorized the application must be made known to the judge acting on the application and ultimately through his order, to any person who was a party to a proceeding in which the contents of any intercepted communication or evidence derived therefrom are offered in evidence or otherwise disclosed in court. These two requirements are equally important in the legislative scheme. If the only important fact were that one of the persons given the power to act by section 2516(1) had in fact authorized the application, it would not have been necessary to add the additional provisions of section 2518 to require the identity of the acting official to be set forth in the application and order."

"If by way of illustration it is assumed that the Attorney General himself had authorized the application to be filed, it would obviously be a violation of the statute for the application and the order to state that not the Attorney General but a specified Assistant Attorney General had authorized the application. The issuing judge, in the case of this illustration, and those persons who subsequently read this order would be misled and would place the responsibility for the authorization of the application upon the wrong person, that is, upon the specific Assistant Attorney General named in the application and the order rather than upon the Attorney General who had, in fact authorized the application. It would not cure the difficulty in the factual framework of this illustration to establish subsequent to the issuance of the wire tap order that the application had in fact been authorized by the Attorney General himself rather than by the Assistant Attorney General named in the application and order, since the statute requires the identity of the authorizing official to be made known to the issuing judge before the order is entered by him. Thus both tests must be met and one alone will not suffice."

As was stated in the same case under *sub nom U.S. v. Giordano, supra,* 469 F. 2d 522 at page 530:

"Acceptance of the government arguments would negate much of Title III. Section 2516 could be fulfilled by anyone; the government could extend the alter ego argument apparently without limit. Section 2518(1)(a) (requiring that the judge be informed of the identity of the person authorizing the application) and Section 2518(4)(d) requiring the judge to state this information in the wire tap order could be ignored. One is proper to ask what would be left of the statutory scheme designed to protect the individual from potential government abuse—except the assurances of government officials themselves. We agree with Judge Becker, who stated in *U.S. v. Narducci*, 341 F. Supp. 1107, 1115 (E.D.Pa., 1972), that 'the necessity for strict compliance with the statute in a wire tap situation stems just as much from the precedent-setting example of condoning laxity which could lead to further laxity in years to come, with serious consequences to personal liberties, as from concern over the rights of the accused in a given case.' "

See *U.S. v. Giordano*, cert. granted 41 U.S. Law Week 3513, *supra.*

In *U.S. v. Stanley* unreported as yet. United States District Court, Northern District of Florida, Atlantic Division, Criminal number 27541, June 18, 1973, suppression of evidence procured under a wire tapping warrant, was had because the requirements of Section 2516(1) of 18 U.S.C. were not met. There, the United States Attorney applied to the Department of Justice for an authorization to apply for a wire tap warrant. Peterson and two other attorneys of the Department of Justice reviewed the request and they acted favorably upon it and then forwarded to John N. Mitchell the then Attorney General who initialed a memorandum specifically designating Peterson to exercise the powers described in Section 2516 authorizing the local United States Attorney to apply for the warrant. The memorandum read as follows:

"This is with regard to your recommendation that authorization be given to J. Robert Sparks of the Criminal Division to make application for an order of the court under Title 18, U.S. Code, Section 2518, permitting the interception of wire communications...in connection with the investigation into possible violations of Title 18, U.S. Code, Sections 1955 and 371 by Joe Dean Stanley..."

"Pursuant to the powers conferred on me by Section 2516 of Title 18, U.S. Code, you are hereby *specially designated* to exercise those powers for the purpose of authorizing...to make the above-described application." (Emphasis added)

The Court held that the memorandum was ambiguous because it supported an inference that the Attorney General made the decision or delegated the jurisdiction to Peterson to make the authorization. The government then later submitted an affidavit of Mitchell that he made the decision. Peterson by affidavit supported Mitchell's assertion. The Court held that Mitchell made the decision. However it was also found as a fact that the wire tap warrant was granted on the belief that Peterson being specially designated authorized the application to be made. A successive application was also made by the United States Attorney to continue or extend the wire tap warrant. The same routine was followed by the officials of the Department of Justice. In this respect the Court stated:

"...the court finds that this portion of its orders..., is false because it identifies the Acting Assistant Attorney General for the Criminal Division of the United States Department of Justice as the person who authorized the application when, in fact, the Attorney General authorized the application. The orders do not identify the Attorney General as the person who authorized the

extension application. The court also finds the unmistakeable impression created by Spark's extension application to the court was the cause of the falsity in the orders."

The Court then summarized its findings as follows, namely: Mitchell the Attorney General of the United States at the time authorized the application for the wire tap warrant. The applications for the wire tap warrant presented to the court did not identify Mitchell the Attorney General as the official who authorized the applications and the orders issued by the court did not identify Mitchell as the person who authorized the applications.

In *Sparks,* the parties to this application were noted and commented upon in footnote 13. That footnote stated as follows:

"It is possible that the Fourth Circuit's decision in *U.S. v. Bobo*...may be distinguishable from the other decisions. *In Bobo,* the Fourth Circuit referred to its earlier decision in *U.S. v. Giordano,* 469 F. 2d 522...cert. granted, 41 U.S.L.W. 3516...in which it held that if neither the Attorney General nor any of the Assistant Attorneys General personally authorized a wire tap application the fruits of the wire tap must be suppressed and quoted with approval the following words from Giordano: 'perhaps it can plausibly be argued that when an application is properly authorized and only the identity of the source is mistakenly transmitted to the judge, he would have authorized a wire tap had he known the real facts.' "

"The *Bobo* panel went on to state: " 'In this case, *unlike Giordano,* the Attorney General personally initialed the memorandum approving the specific wire tap authorization here questioned. *The fact that Mitchell himself had approved the request was made known to the judge to*

whom the application was made...slip opinion at 28-29.' " (Emphasis added in the original)

"Thus it may be that in *Bobo* the misidentification of the authorizing official in the written application was corrected orally before the wire tap order was entered. Since it is not clear from the *Bobo* opinion whether there was also a misidentification in the wire tap order itself, *compare* slip opinion at 25 with slip opinion at 29, it is possible that the factual situation in *Bobo* differs entirely from the factual situations in the other decisions and the case now before this court."

It is respectfully submitted that there was a misidentification of facts of the authorization in this case when the wire tap warrant was originally applied for.

However, as shown above, these facts were not contained in the original application, but were supplied in this case when the Court of Appeals directed a remand. The District Court's decision on remand (Appendix C) concedes that the warrant contained an erroneous recital of the official in the Department of Justice who actually authorized the institution of the application. The exact language of this opinion is as follows:

"Affidavits presented by the government reveal that Will Wilson was identified as the authorizing officer when, in fact, the Attorney General had personally approved the applications."

The District Court then denied the motion on the basis of the Second Circuit holding in *U.S. v. Pisacano*, 459 F. 2d, 259 (1972).

A reading of the affidavits of Mitchell, Peterson, Wilson and Lindenbaum show that they are inconsistent and ambiguous.

The memorandum of December 3, 1970 initialed by John N. Mitchell and addressed to Will Wilson (Appendix I) stated that Wilson was specifically designated under Section 2516, to exercise the power to authorize the United States Attorney to apply for the warrants. But Peterson, in an affidavit verified February 15, 1972 (Appendix F) alleged that he signed Wilson's name. It will be noted that nowhere did Peterson allege that the Attorney General himself acted. Further, the expression in Peterson's affidavit found on the last page in next to the last paragraph that:

> "Following approval in the Office of the Attorney General, the Criminal Division dispatched the letter dated December 3, 1970..."

could also mean that the Attorney General himself did not authorize the institution of the application but someone in his office did. The expression is ambiguous. In *U.S. v. Robinson* and *U.S. v. Focareli, supra,* Sol Lindenbaum actually executed the approval.

Adverting to the Attorney General's affidavit of February 18, 1972 (Appendix G), it may be observed that Mitchell alleged that he "chose" not to designate anyone to make the authorization. He then alleged that requests for such authorization were reviewed by Lindenbaum who then "transmitted the request" with Lindenbaum's recommendation. If the Attorney General approved the request he indicated his approval by initialing the memorandum.

It is submitted the government attempted to prove too much. First, while Mitchell in his affidavit stated that he established a procedure where all requests for authorization to

apply for wire interception orders were ultimately forwarded to him with a written recommendation for approval. Mitchell then stated that he did not designate an Assistant Attorney General to authorize applications without his approval because he wanted such requests to be forwarded to him for his consideration. "[T]his procedure was intended to centralize and meet a responsibility for a control of the policies to be followed..." Then after describing the mechanics of how the Department of Justice processed these applications, Mitchell in an apparent distinction to what he said about centralizing the authority, stated that since November 20, 1971 he personally authorized all applications.

Initially Mitchell stated that he wanted the authority to be centralized in him. He then stated that after November 20, 1971 he personally authorized applications. This supports an inference that Mitchell did not personally authorize applications prior to November 20, 1971. Mitchell further admitted in his affidavit that when he was not present he "verbally authorized his Executive Assistant to act on his behalf...".

In *U.S. v. Chavez*, Cir. 9, February 28, 1973, 13 Criminal Law Reporter 2001, certiorari granted May 21, 1973, 13 Criminal Law Reporter 4049, the precise problem was reviewed and resolved unfavorably to the government. There the Court determined that a division of labor among the officials in the Department of Justice resulted in the loss of identity of the designated official required by Congressional enactment. On page 2002 of 13 Criminal Law Reporter, it was stated in part that:

"For us to sanction the procedure used in this case would be to defeat the Congressional scheme. As we

have shown, the application, order, affidavits and memoranda submitted to the District Court in connection with the motion to suppress are contradictory. The court would have to engage in considerable sifting and evaluating to determine which of the rather substantial cast of characters actually approved...requests, and even then if could not be certain. It is precisely this type of 'button, whose got the button' guessing game that is characteristic of the institutional decision and that Congress intended to eliminate...".

"The Government's argument suffers from a second defect. Although former Attorney General Mitchell assumed responsibility after the fact of this case were we to approve this procedure there would be nothing to prevent further Attorneys General from remaining silent if a particular wire tap proved embarassing... The Wilson letter and the Mitchell memorandum were carefully drawn to create the illusion of compliance with the act. Without Mitchell's affidavit, the lines of responsibility lead to Wilson, not to Mitchell. The quality of administrative action increases when officials know that their decisions can not escape direct scrutiny by the Courts, Congress or the public...".

In view of Congresses desire to control this most drastic means of investigation the wire tapping, a reading of the alleged "authorizations" in this case leads to the conclusion that the mandate of Congress was executed in a rather casual manner.

It is submitted that there was no probable cause for the issuance of a wire tap warrant in regard to the petitioner Gray. Source number 1, the first informant, supplied hearsay to the agents. Aside from the hearsay, the agent made no independent findings establishing that Gray was or is engaged in illegal gambling. All the agent did was discover that there

were numerous calls made from the telephones that Gray subscribed to. This information was garnered from the toll records of the Telephone Company. The toll records indicated that between February 25, 1970 and November 12, 1970 there were 160 calls to telephone number 914-793-1281; from February 24, 1970 to November 12, 1970 there were 370 calls to telephone number 914-793-1410; from August 13, 1970 to November 12, 1970 there were 1,435 calls to telephone number 803-583-9871 and 583-2503. Area code number 914 is in the New York area (Westchester County).

However, the substance of these calls were unknown to the agent. Hence the activity over these telephones was entirely consistent with innocence. In this age of communication, telephone calls, even numerous long distance calls, is quite normal.

Because of the dangers involved to First Amendment Rights in the use of wire tapping, it would seem that more is required to establish probable cause than would be the case in a conventional search warrant involving tangible property; see *Berger v. N.Y.*, 388 U.S. 41, 18 L.Ed. 2d 1040, 87 S.Ct. 1873 at page 56 of 388 U.S. In the concurring opinion of Mr. Justice Stewart, in Berger, it was stated on page 69 of 388 U.S. that:

> "... the standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion ..."

In this vein, it is further submitted to this Court, that the restriction embodied in the Fourth Amendment are just as important as the restrictions of the First Amendment. Wire

tapping, undoubtedly, involves a surveillance of speech. Therefore, this Court's holding in *Roaden v. Commonwealth of Kentucky*, United States Supreme Court, unreported as yet, June 25, 1973, 13 Criminal Law Reporter, 3243, 3246, would seem applicable. In the opinion of the Chief Justice of this Court a seizure of that which comes within the ambit of the First Amendment:

> "... invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression."

In addition, the informant in this case, designated as source number 1, was not shown to be reliable. Although the informant's reliability was attested to by the agent in his affidavit, where it was alleged:

> "... source number 1, has been known to the Federal Bureau of Investigation for three years and has been contacted on a regular basis for the past year. The source has furnished reliable information on a number of occasions concerning gambling and other activities, which information has been established as true by independent investigation by the Federal Bureau of Investigation."

There was no showing that the informants help in convictions. All that was alleged was a conclusion by the authorities as to reliability. There was absolutely no fact presented to a judge whereby an independent assessment of probable cause could be made in determining whether a wire tap warrant s hould be granted. See *Spinelli v. U.S.*, 339 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584.

Regarding source number 7 whose hearsay has been described hereinabove and was said to have implicated GRAY

and BOBO, there was not one suggestion that this informant knew of his own knowledge that GRAY was operating with BOBO. At first it was alleged that source number 7 "determined" from another bookmaker that BOBO was doing business with GRAY. Who the other bookmaker was is not stated. Whether the other bookmaker knew this of his own knowledge was not stated. Source number 7 did say that during the latter part of October 1970 he was in BOBO's place of business and he saw him making a long distance call to "Jack" in Greenville and "obtained a line".

Of course this is completely inconclusive and meaningless. It in no way implicates GRAY. As to BOBO, the informant did give hearsay as to events concerning BOBO, namely that he spoke to BOBO about the "line". However as argued hereinabove, regarding informant number 1, there was no factual showing that source number 7 was reliable. The agent in his affidavit avered that source number 7 was known to the FBI for two years and was contacted on a regular basis for one and a half years; that he was of known reliability and furnished information concerning gambling and criminal activities in the Spartenburg area. The paragraph concludes with the assertion that the information furnished by source 7 led to "one federal arrest and one arrest by local authorities." Whether these arrests led to convictions is not stated. Therefore, it can be concluded that if there were convictions which are undated, they are "stale" and do not show any evidence of present reliability. It can also be inferred that there were no convictions. Therefore, there is no probable cause that this informant was reliable.

In regard to the independent investigation of the authorities of BOBO, it was merely alleged BOBO had two convictions

on gambling charges and other convictions relating to possession of wagering paraphernalia. The phones attributed to BOBO were traced and were claimed to have been in the name of Thomas D. Steadman. The toll records of the Telephone Company indicated that between May 2, 1969 and November 1, 1970 there were 846 calls made from the subject telephones to 803-244-0928 and 803-244-0966. What the substance of these calls were, were not stated; nor was it stated whether BOBO made the calls himself.

Source number 8, another informant, gave hearsay in regard to the petitioners GOLDBERG, McEWEN and SMITH, who is not a petitioner herein. Source number 8's hearsay contained conclusions as to "laying off bets", "obtaining line information" and the like. These conclusions in part were based on alleged conversations source number 8 allegedly had with GOLDBERG and SMITH. It was further claimed that on September 4, 1970 informant number 8 advised the authorities that he observed GOLDBERG and McEWEN using the telephones to obtain "line information" and to accept bets. However, it is not stated when they were doing this. Similarly, it was alleged that on November 4th and 5th, 1970 number 8 gave similar "advice" to the agent. Further that source number 8 stated he personally observed GOLDBERG and McEWEN accepting bets and giving out "line" information.

The date of the warrant authorizing the wire tapping was December 8th. Therefore it is respectfully submitted that the hearsay from source number 8 as well as the other hearsay from the other sources is not timely and that therefore the warrant was based on "stale" evidence; see, *Sgro v. U.S.*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138.

III

The remaining issue herein, is whether the defendants were properly convicted for a conspiracy under 18 U.S.C. 371. The purpose of the conspiracy was alleged to be a violation of Section 1955 of 18 U.S.C. However, the petitioners were also indicted under 18 U.S.C. 1955. At the conclusion of the taking of all testimony, the government elected to discontinue the prosecution under the second count charging a violation of Section 1955. Petitioners then moved to dismiss the first count charging conspiracy. That motion was denied. It is respectfully put, that this was error for the following reasons.

Section 1955 of 18 U.S.C. required a concert of action and hence it would seem that a conspiracy charge was extraneous to the issue and was in effect supplanted by Section 1955. See *Pinkerton v. United States*, 328 U.S. 640, 90 L.Ed. 1489, 66 S.Ct. 1180 where it was stated on page 643 of 328 U.S. that:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States v. Katz*, 271 U.S. 354, 355, 356, 70 L.Ed. 986, 987, 988, 48 S.Ct. 513; *Gabardi v. United States*, 287 U.S. 112, 121, 122, 77 L.Ed. 206, 210, 211, 53 S.Ct. 35, 84 A.L.R. 370. . . ."

In *U.S. v. Figueredo*, U.S.D.C.M. Fla. November 20, 1972, 12 Criminal Law Reporter, 2253, where it was held that no offense in violation of Section 371 making conspiracy a

crime, can be committed where the principals of the conspiracy are liable under the substantive section, 1955 of 18 U.S.C.

In *Callanan v. United States*, 364 U.S. 587, 5 L.Ed. 2d 312, 81 S.Ct. 321 the petitioner was convicted in the United States District Court on one count charging a conspiracy to obstruct commerce by extortion and the substantive count charging the obstruction of commerce by extortion. Both crimes were predicated on the Hobbs Anti Racketeering Act. The petitioner was sentenced to consecutive jail terms of twelve years on each count. The issue before the Supreme Court was whether the sentencing was incorrect because the conspiracy count merged in the substantive count. It was held that the conspiracy count was separate and apart from the substantive count of extortion. However, it was also stated on page 597 of 364 U.S.:

> "Here we have no such dubieties within the statute itself. Unlike all of these cases, the problem before us does not involve the appropriate unit of prosecution — whether conduct constitutes one or several violations of a single statutory provision — nor is it an open question whether conspiracy and its substantive aim merge into a single offense. . . ."

Since the substantive count under Section 1955 of 18 U.S.C. was dismissed during trial, it would see that the conspiracy count must likewise fail. In *Parr v. United States*, 363 U.S. 370, 4 L.Ed. (2) 1277, 80 S.Ct. 1171 it was stated on page 393 of the 363 U.S. that:

> "Inasmuch as the twentieth count charging petitioners with conspiring to commit the offense complained of in count

one, and inasmuch as, on the facts of this record, that count cannot be sustained, it follows that petitioners' convictions upon the twentieth count cannot stand."

Finally, there was no showing in this case that the defendants intended to conspire to violate section 1955 of 18 U.S.C. Section 1955 has the following elements: (a) the conducting, financing, managing, supervising, direction or ownership of all or part of an illegal gambling business; (c) an illegal business means a gambling business; (c) which involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and (d) such business had been or remained in substantially continuous operation for a period in excess of 30 days or had a gross revenue of $2,000.00 in any single day.

There was no showing that these defendants, even if they dealt with each other, agreed to operate such a business. There was no showing that any defendant who dealt with the others knew that there were five or more persons who were involved in the conduct and other activities defined in the statute of such gambling business or that any defendant who dealt with the others knew that the business remained in continuous operation for a period in excess of thirty days or had a gross revenue of $2,000.00 in any day. See *United States v. DeCesaro,* 349 F. Supp. 546, 549 U.S.D.C. ED Wisc. November 1, 1972.

Even assuming that the defendants conspired, the conspiracy may have involved a violation of a state law only. There was no showing of an intent to violate a federal statute.

In *Ingram v. United States,* 360 U.S. 862 it was held that a

person is not necessarily a member of a criminal conspiracy to violate a federal tax law where there is no proof that he had the intent required for the commission of the substantive offense which was the object of the said conspiracy. In *United States v. Barone*, 467 F.2d 247 (Cir. 2, 1972), it was stated on page 249 of that opinion that one of the appellants can not be convicted of a conspiracy to violate 18 U.S.C. 1084 unless it was shown that he knew or could reasonably foresee that an interstate communication would be used.

While an interstate communication is not involved in Section 1955, nevertheless that case is relevant to this situation where the government did not show that any petitioner knew that the other petitioners were part of a combination as described in Section 1955 and that such combination endured for the statutory period, or the statutory amount of money was earned in any one day. See *Ingram v. United States*, otherwise reported in 3 L.Ed. 2d 1503, 79 S.Ct. 1314.

See also *United States v. Falcone*, 311 U.S. 205, 85 L.Ed. 128, 61 S.Ct. 204. Under the rule of that case, the government must establish beyond a reasonable doubt that each particular group of the petitioners, each group numbering less than five, knew of a group of five who were committing the acts and had the status as defined in Section 1955. In other words, that each petitioner adopted the venture as his own and wanted it to succeed.

CONCLUSION

This Court should grant Petitioners' request for a Writ of Certiorari and entertain briefs and arguments on the merits.

Submitted by

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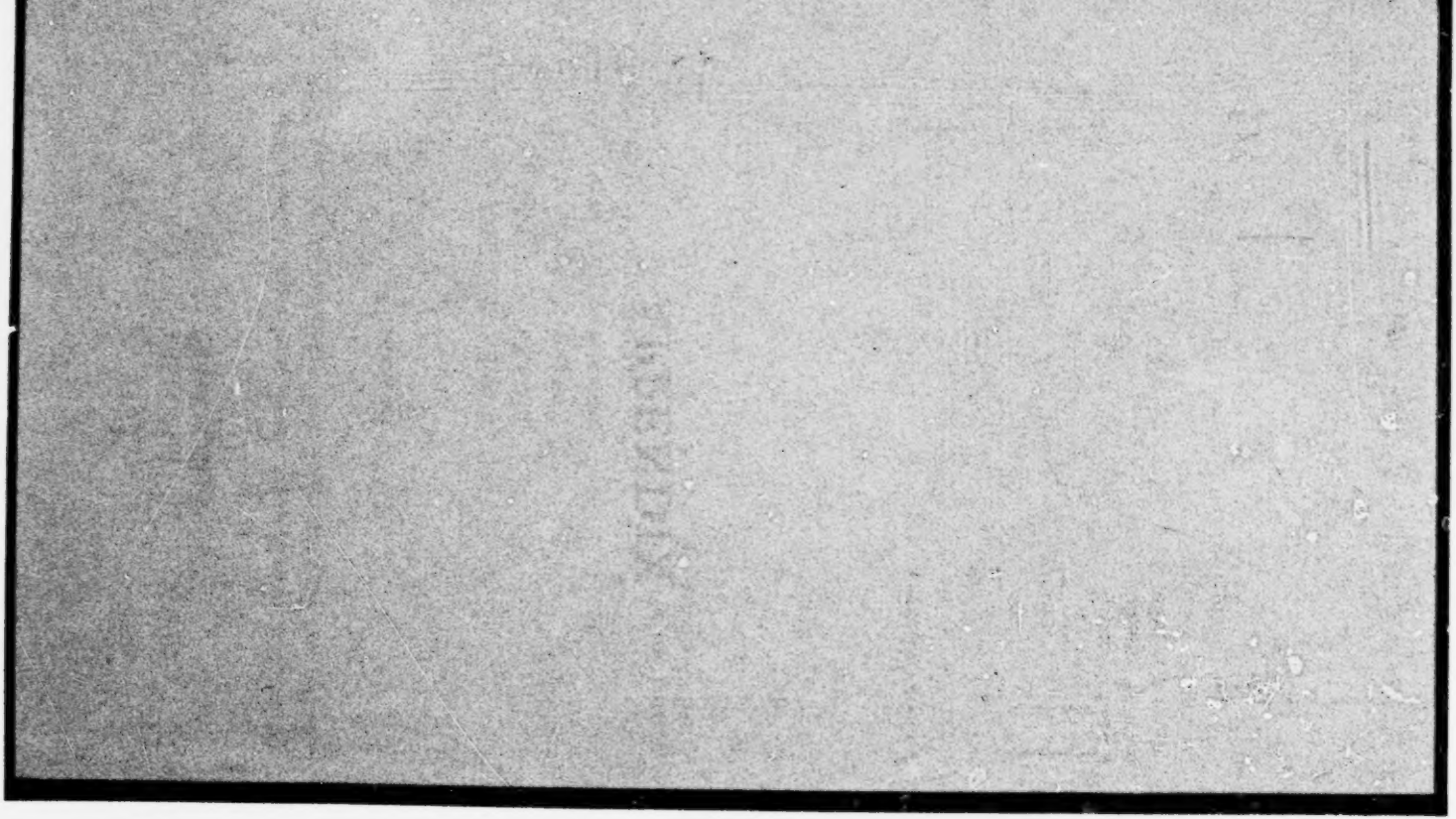
United States Supreme Court,
Attorneys for Petitioners

APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Nos. 71-
2077 — 2078 — 2079

UNITED STATES OF AMERICA

Appellee

v.

JOHN JACOB BOBO, JACK M. GRAY,
WILLIAM DUWARD McEWEN and PAUL GOLDBERG

Appellants

Appeal from the United States District Court for the District of South Carolina. J. Robert Martin, Jr., District Judge.

(Argued November 3, 1972 Decided April 23, 1973).

Before Haynsworth, Chief Judge, Boreman, Senior Circuit Judge, and Widener, Circuit Judge

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William B. Long (Thomas W. Whiteside on brief) for Appellant John Jacob Bobo, in No. 71-2077; Albert Q. Taylor, Jr., for Appellant Jack M. Gray, in No. 71-2078; Klyde Robinson and Geddes H. Martin for Appellants William Duward McEwen and Paul Goldberg, in No. 71-2079; Oscar W. Bannister, Jr., Assistant United States Attorney (John K. Grisso, United States Attorney on brief) for Appellees in Nos. 71-2077, 71-2078 and 71-2079.

WIDENER, Circuit Judge:

Appellants Jack M. Gray and John Jacob Bobo were convicted for violation of 18 USC §1952 on indictments charging that they used mail telephone facilities and Western Union teletype services in interstate commerce with intent to promote, manage, establish and carry on an unlawful activity, that being a business enterprise involving gambling in violation of the laws of the State of South Carolina.

Appellants Jack M. Gray, John Jacob Bobo, William Duward McEwen and Paul Goldberg were convicted for conspiracy to conduct, finance, manage, supervise, direct or own an illegal gambling business involving five or more persons within the meaning of 18 USC §1955. Another defendant, Porter, was convicted for the substantive violation of 18 USC §1955. After this appeal was taken, Porter moved for voluntary dismissal of his appeal, which motion was granted. Certain other co-defendants pleaded guilty to these same violations, while other co-defendants pleaded guilty to violations of 18 USC §1084. (§1084 relates to interstate transmission of wagering information.)

The proper disposition of these appeals lies in the quagmire of facts involved. While the facts surrounding each allegation can best be considered separately, a basic outline is necessary for understanding the contentions raised on appeal.

Appellant Jack Gray was a New York resident, where he occasionally placed small bets with local bookmakers. He was transferred by his employer to Greenville, South Carolina, nine or ten years ago. Unable to locate a South Carolina bookmaker for approximately three years, Gray continued

placing bets, through friends, with New York bookmakers. Gray located appellant Porter, with whom he began betting locally, and also Bobo, with whom he began betting in Spartanburg, South Carolina.

Appellant Bobo and his helper, Kirkland, communicated and exchanged bets not only with Gray and his helper, Segan, but also with appellant Porter in Greenville and with appellants McEwen and his helper, Goldberg, in Charleston, South Carolina. It should be noted here that all appellants, except Gray, admit to be bookmakers receiving and making bets on athletic contests, in violation of state law, for a time period and in a dollar amount sufficient to meet the specific requirements of 18 USC §1955. They do, however, contend that they did not act together so as to constitute a business involving five or more persons, which is also required by the Act. Gray contends that he is a mere bettor with a system and not a bookmaker.

During the period October, 1970 through January, 1971, appellants McEwen and Goldberg, by their own admission, operated, in violation of state law, a bookmaking establishment known as the Uptown Sports Center, 476 King Street, in Charleston, South Carolina. They had so operated for several years and were generally known in Charleston as bookmakers. They normally received bets from their customers, some of whom were bookmakers, and they in turn placed bets with other persons and sometimes those others were bookmakers.

The appellants tried to bet by a system, each with his own refinements. Gray developed a system whereby he could not lose. He might not always win, but he could not lose. Gray

noticed that the betting line out of New York and the line out of South Carolina would fluctuate. The line is a point spread between teams in an athletic contest, which is determined by the bookmaker or makers offering the bet. The line might come from New York at, say, New York plus seven points in a game between New York and Dallas. But Gray noticed that up until game time the line would fluctuate in different places, particularly where local prejudices would influence the betting. The variation Gray first observed was the line in New York to be Dallas plus 2-1/2 and the South Carolina line to be New York plus 2. By betting both sides, if the game score differential was zero to four points, he would win both bets. In fact, the game ended 13-13, so Gray did win both bets (commonly called a split bet). Gray realized that he could, by taking advantage of the local variation in the line, increase his chances of winning over that of a bettor merely using a single bookmaker in one area. When Gray located Bobo in Spartanburg, he then had access to two or three New York lines and Bobo's and Porter's lines in South Carolina.

Gray further refined his system by obtaining an additional advantage from a New York bookmaker. If Gray would agree to bet $500 per game on all 13 pro-football games played over the weekend, the New York office would give him a 1/2 point advantage from the line. By obtaining the same concession from Bobo in South Carolina, he was in a position to bet both sides of a game, with an additional point variation plus any difference already existing in the several lines. Bobo further fit into the scheme as follows: Gray was required to bet $500 on each game being played in order to acquire his concession of 1/2 point. Gray, like any other bettor, had to pay the vigorish[1] on his losing bets. Gray agreed to pass on

wagers from Bobo when the wager sought by Bobo was a wager that Gray could make under his system. Thus, Gray fulfilled his obligation for total number of bets, and since it was Bobo's bet he placed, he eliminated the possibility of losing the 10% vigorish in the event of the loss, and would win both sides if the score fell within the point spread. This also facilitated Bobo's efforts to balance his books prior to the weekly games.

Gray would also take what are called juice bets from appellant Porter. It appeared that Porter's specialty was his superior ability to predict scores based on his knowledge of the teams involved. A juice bet is a bet very likely to win because of information known to the bettor which, if known to the bookmaker, would change the odds or the bookmaker would not offer the bet at all.

These appellants have raised a total of nine allegations and each appellant states in his brief that he incorporates and adopts any of the legal arguments of the other which might inher to his benefit. While we do not normally consider it our obligation in a case of multiple appeals to weed out which arguments best fit the various appellants, the consideration of each argument shall, unless otherwise stated, apply to each appellant.

I

During the course of the investigation and prosecution of this case, the government made extensive use of information gathered by the use of wiretaps. With regard to these wiretaps, the appellants make the following allegations:

1. The provisions of Title III of the Omnibus Crime Control Act of 1968 violate the Fourth Amendment guarantee against unreasonable searches and seizures.

2. There was insufficient showing by the government that "other investigative procedures" would not have been effective as required by 18 USC § 2518(1)(c).

3. There was insufficient compliance by the government with the mandatory requirements for authorization contained in 18 USC § 2516(1).

The Fourth Amendment says that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Men may differ, and many courts have differed, as to what is a reasonable search and seizure, but it is beyond question that the Fourth Amendment only prohibits unreasonable searches and seizures. *Carroll v. United States*, 267 US 132, 48 S.Ct. 280, 69 L.Ed. 543 (1925); *Katz v. United States*, 389 US 347, 19 L.Ed.(2d) 576, 88 S.Ct. 507 (1967). The Supreme Court has, on numerous occasions, discussed the nature of the right protected by the Fourth Amendment. In *Wolf v. Colorado*, 338 US 25, 93 L.Ed. 1782, 69 S.Ct. 1359 (1949), the court stated that "The security of one's privacy against arbitrary intrusion by the police which is at the core of the Fourth Amendment — is basic to a free society." Perhaps the clearest statement by the court was in *Camara v. Municipal Court*, 387 US 523, 18 L.Ed. (2d) 905, 87 S.Ct. 1754 (1967): "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the

privacy and security of individuals against arbitrary invasions by government officials." Thus, through the explicit language of the Amendment itself and the cases interpreting it, we know that the Fourth Amendment means what it says — unreasonable searches are prohibited. The court has likewise recognized that the requirements of the Fourth Amendment are not inflexible or obtusely unyielding to the legitimate needs of law enforcement. *Osborn v. United States*, 385 US 323, 330, n. 9, 17 L.Ed.(2d) 394, 87 S.Ct. 429 (1967); *Ohio ex rel Eaton v. Price*, 364 US 263, 4 L.Ed.(2d) 1708, 80 S.Ct. 1463 (separate opinion) (1963). It is, then, with an eye toward implementing the Fourth Amendment's goal of securing the sanctity of personal privacy and at the same time accommodating the legitimate ends of law enforcement, that we view the challenged provisions of the Omnibus Crime Control Act of 1968 to see if it is constitutionally valid.

The subject of electronic surveillance has been before the Supreme Court in several recent cases; so, we are not without guidelines with which to make our determination. In *Berger v. New York*, 388 US 41, 18 L.Ed.(2d) 1040, 87 S.Ct. 1873 (1967), the Supreme Court considered the constitutionality of the New York permissive eavesdrop statute. *N.Y. Code Crim. Proc.*, §813-a. Although *Berger* struck down the New York statute, the court made it clear that electronic surveillance is permissible when judicially authorized under the most precise and discriminating circumstances which meet the requirements of the Fourth Amendment. *Berger* at 56; *Osborn*, supra. In *Berger*, the court contrasted safeguards present in the *Osborn* case, in which the court had earlier upheld an authorization for electronic surveillance, and the elements which were lacking in the New York statute which was declared unconstitutional.

We read *Berger* and *Katz* as enumerating certain safeguards without which an authorization for the interception of wire or oral communications may not be valid: a neutral and detached judicial authority must be interposed between the government and the public; a showing of probable cause that a particular offense has been or is being committed; the communications, conversations, or discussions sought to be intercepted should be described with particularity; the period during which the interception is authorized must be limited so it is not the equivalent of a series of intrusions pursuant to a single showing of probable cause; the order must be promptly executed; extensions or renewals of the order must have separate showings of probable cause; the order must terminate the eavesdropping once the conversation sought is seized; there must be some showing of special facts to excuse the lack of notice occasioned by necessary secrecy; and the order must provide for a prompt return which must be made describing what has been seized.

The court, in Berger, concluded that the statute's blanket grant of permission of eavesdrop was without adequate judicial supervision or protective procedures. In *Katz*, the failure of the order to provide certain safeguards was held fatal.

In *Osborn*, probable cause consisted of affidavits of a witness in a federal court sought to be bribed by an attorney. The order approved there, and cited with approval in *Berger*, illustrates safeguards which, when effected, will avoid conflict with the Fourth Amendment. The order described the type of conversation sought with particularity; the officer could not search unauthorized areas; once the conversation was intercepted, the officer could not use the order for further search;

one limited intrusion was authorized, rather than a series or a continuous surveillance; a new order was issued when the officer sought to resume the search and probable cause was shown for the new order; the order was executed by the officer with dispatch; the officer was required to make a return on the order showing how it was executed and how it was seized, and he did so.

The factors listed in *Berger, Katz* and *Osborn* are, of course, important, but we must look, as did the Supreme Court, to the totality of the circumstances and the overall impact of the statute to see if it authorizes indiscriminate and irresponsible use of electronic surveillance or if it authorizes a reasonable search under the Fourth Amendment.

The Crime Control Act was by no means ill-advised or hastily conceived legislation. Congress expressed an awareness of the decisions of the Supreme Court in *Osborn, Berger* and *Katz*, and made an effort to comply with the standards which had been enunciated in those cases. Sen. Rep. No. 1097, 90th Cong., 2nd Sess., 1968 U.S. Code Cong. & Adm. News, p. 2112, et seq; *United States v. Cox*, 449 F(2d) 679, 684 (10th Cir. 1971), cert. den. 406 US 934, 92 S.Ct. 1783, 31 L.Ed.(2d) 236 (1972); *United States v. Cox*, 476 F(2d) 1293, 1303 (8th Cir. 1972). The legislative history shows that the specific requirements for valid legislation were considered. The need for the legislation was the subject of extensive study not only by the Congress but also by the President and many study committees of the various bar groups. The Presidential Commission found that organized criminals use wire and oral communications and recommended that surveillance of such communications was essential to the effective detection and prosecution of crime. *President's Commission on Law*

Enforcement and Administration of Justice, (1967). Of course, the fact that the legislation is necessary and the fact that Congress attempted to comply with the Supreme Court's rulings does not mean that the statute is constitutional, but we properly should give consideration to the care with which the legislation was drawn. The statute's purpose was not only to authorize certain limited electronic surveillance, but also to correct and prevent many of its abuses in the sphere of private as well as criminal investigations. Sen. Rep. No. 1097, 90th Cong., 2nd Sess., 1968 *U.S. Code Cong. and Adm. News*, p. 2112, et seq. Such abuses were also noted by the Supreme Court in *Berger*, supra, at 46, 47.

The basic scheme of the Act is to prohibit all interception of wire and oral communications except as authorized by the Act itself. The provisions of the Act with which we are here concerned, 18 USC §§2515-2520, set out a comprehensive scheme for judicial authorization of interception of oral and wire communications. As previously noted, the issue here is not whether wiretapping is *per se* unconstitutional. It is clear from *Berger*, *Osborn* and *Katz* that a statute authorizing wiretapping which contains sufficient prior safeguards is constitutionally permissible.

Utilization of the provisions of the Act is commenced by an intercept authorization application which itself must be authorized by the Attorney General or any Assistant Attorney General specially designated by the Attorney General. 18 USC §2516(1). The application must be made to a federal judge of competent jurisdiction and it must be made in writing upon oath or affirmation.[2] The application must contain: (1) the identity of the applicant and the person authorizing the application; (2) a detailed statement of the facts and circum-

stances relied upon by the applicant to justify his belief that the order should issue. Such statement must set out the particulars of the type of offense being investigated, a particular description of the place where the interception is to be made, a particular description of the type of communications to be intercepted and the identity, if known, of the person committing the offense and whose communications are to be intercepted; (3) a complete statement as to why normal investigative procedures are not being used; (4) a statement of the period for which the interception is required to be maintained;[3] (5) any history of previous authorization applications involving the same persons or places involved in the present application. 18 USC § 2518. The judge to whom the application is made may refuse to grant the order, require additional information if he so desires, or approve the application. Id. The judge may approve the application only if he determines that there is probable cause to believe that a particular offense is, has been, or is about to be, committed; that there is probable cause for belief that communications concerning the offense will be intercepted; that normal investigative procedures have failed or reasonably appear likely to fail; and that there is probable cause for belief that the place to be tapped is used in connection with the offense, or leased to, listed in the name of, or commonly used by, the person involved in the offense. 18 USC § 2518(3). If the judge approves the order, he must specify the persons, if known, and places which are subject to the order, the type of communications to be intercepted and the offense to which it relates, the identity of the applicant, the person authorizing it and the agency authorized to execute it, and the period for which it is effective. 18 USC § 2518(4). The order must terminate the eavesdropping when the objective is attained and may extend in no event longer than thirty days. The

order must also direct that it be executed as soon as practicable and that it shall be executed in a manner which minimizes the interception of extraneous matter. 18 USC § 2518(5). The Act further provides for prompt return by the officer. 18 USC § 2518(8)(a).[4]

We agree with the two circuit courts and over ten district courts which have considered the matter and held that the Act is constitutional.[5] Even a casual reading shows that it does not permit the irresponsible and indiscriminate use of electronic surveillance condemned in *Osborn*, *Berger* and *Katz*. And, upon close analysis, we are of opinion that the statute successfully meets the fundamental criteria there enunciated. The court, in *Berger*, frowned upon the failure of the New York statute to require belief that any particular offense had been or is being committed and its failure to require showing with particularity the persons, places and types of conversations to be intercepted. The Crime Control Act, as noted above, does not allow such indiscretion. The New York Act had no provision for notice and had no requirement of a showing of exigent circumstances to cure that defect. By contrast, the Crime Control Act requires such a showing. The court, in *Berger*, was quite concerned with the provisions of the New York statute authorizing sixty-day orders upon a single showing of probable cause and extensions thereof merely upon a showing that the extension is in the public interest. The Crime Control Act allows an order, at the most, to be effective for only thirty days;[6] and the safeguards surrounding such order convince us that the thirty-day provision is not of itself a constitutional infirmity. With regard to the maximum period of authorized interception, Sen. Rep. No. 1097, 90th Cong., 2d Sess., April 29, 1968, 1968 *U.S. Code Cong. & Adm. News*, at 2190, provides in pertinent part

as follows:

> "Where it is necessary to obtain coverage to only one meeting, the order should not authorize additional surveillance. . . . Where a course of conduct embracing multiple parties extending over a period of time is involved, the order may authorize proportionately longer surveillance but in no event for longer than 30 days, unless extensions are granted. . . . What is important is that the facts in the application on a case-by-case basis justify the period of time of the surveillance."

This congressional intent is expressed in the Act in sections 2518(1)(d), 2518(4)(e) and 2815(5) which provide that the order shall extend only so long as necessary to achieve its objective, with a maximum period of thirty days unless extended. An order which does not automatically terminate upon interception of the communications there described may be granted only upon a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter. The order as issued may only last for a maximum of thirty days unless extended. All extensions of orders must comply with the same requirements as an original order. Thus, while the thirty-day limit may cause some contention, we are of opinion that the Act sufficiently circumscribes the time limit of effectiveness of orders so as to be unobjectionable in a constitutional sense. We are convinced that the Crime Control Act, because of its precise and discriminate requirements and its provision for close judicial supervision, does not violate the Fourth Amendment.

The provisions of the Act relating to emergency authorizations not requiring prior judicial scrutiny are not before us and as to them we express no opinion.

The appellants next contend that there was an insufficient showing by the government that "other investigative procedures" would have been ineffective as required by 18 USC § 2518(1)(c). As previously mentioned, the Crime Control Act provides that an application for an authorization order must contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. If the Crime Control Act could be validly utilized in any investigation, it would seem to be one involving gambling operations using telephone facilities almost exclusively as a means for communications. We also note the finding of the President's Commission concerning the extensive use by criminals of telephone facilities. In this case, the government contends that the affidavit of Roger J. Fontanella, Special Agent of the FBI, sufficiently establishes that normal investigative techniques were not and would not be sufficient. We agree. Fontanella is a gambling investigative expert with five years' experience. His affidavit states, in pertinent part, the following:

"Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures reasonably appear to be unlikely to succeed in establishing that Jack M. Gray, John Jacob Bobo, William Duward McEwen, Charles Smith, Paul Goldberg, and others as yet unknown, are involved in gambling activities on the telephone in violation of South Carolina and Federal laws, what is the full extent of the interstate gambling conspiracy, who are involved as co-conspirators, aiders and abettors, and what is the hierarchy of this illegal gambling operation. This is based upon the following:

d. Through my experience and the experience of other Special Agents who have worked on gambling cases, records that have been seized in gambling raids have generally not been sufficient to establish the interstate elements of federal offenses because such records are difficult to interpret and are sometimes in code. Many times these records are of little or no significance without further knowledge of the gambler's activities and the interstate nature of the gambling operation. The confidential informants referred to in this affidavit refuse to testify against the parties named herein because of fear for their personal safety. Physical surveillances on gambling operations heretofore mentioned have failed to furnish substantial information of a federal gambling violation because there is little or no personal contact between these persons. If surveillance is conducted on a regular basis, it would jeopardize the investigation. Furthermore, the utilization of undercover agents would not likely prove a federal violation due to the small number of people who have access to the overall plan or scheme.

e. For the reasons set out hereinabove, all normal avenues of investigation would fail to produce the desired proof, in my opinion. I further believe that the only reasonable way to develop the necessary evidence of violations of Federal statutes relating to gambling by those persons named herein is to intercept wire communications to and from the telephones subscribed to and/or used by individuals previously mentioned.

f. Investigation indicates that the following listed telephone numbers have been used, are being used, and will continue to be used to carry on the business of bookmaking as described above:

Telephones 244-0928 and 244-0966, which are listed to Jack M. Gray, 815 Edwards Road, Apartment 26, Williamsburg Manor, Greenville, South Carolina.

Telephones 583-2505 and 583-9871, which are listed to Thomas D. Steadman, 955 Howard Street, Spartanburg, South Carolina.

Telephones 723-6010 and 723-6420, which are listed to Uptown Sports Center, 476 King Street, Charleston, South Carolina."

In our view, the above affidavit constituted a sufficient basis from which the district court could have, and did, conclude that normal investigative procedures reasonably appeared unlikely to succeed. We find no merit to the contention that §§ 2518(1)(c) and 2518(3)(c) were not complied with.

Appellants further contend that the authorization applications did not comply with § 2516(1) and § 2518 which provide, in part:

§ 2516

"(1) ... Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify ...

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;[7]

The application for the wiretap authorization order in this case took the following course. On December 2, 1970, the director of the FBI made a request for authorization to apply for an order. The request was reviewed by the Criminal Division of the Department of Justice and forwarded to the Attorney

General with the recommendation that it be approved. Sol Lindenbaum, the Attorney General's Executive Assistant reviewed the request and likewise recommended approval. Attorney General John N. Mitchell approved the request for authority to apply for the interception order by personally initialing a memorandum addressed to Assistant Attorney General Will Wilson, which stated, in part:

> "This is with regard to your recommendation that authorization be given to Joseph O. Rogers, Jr., United States Attorney, District of South Carolina, to make application . . . .
>
> "Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Joseph O. Rogers, Jr., to make the above described application."

Based upon the Attorney General's approval, the Criminal Division sent a letter, dated December 3, 1970, to the United States Attorney for South Carolina. The letter was actually signed by Deputy Assistant Attorney General Henry Peterson, who was authorized to, and did, sign Will Wilson's name. It appears that Peterson had been authorized to sign Wilson's name to letters of authorization for applications for wiretap orders after such applications had been approved by the Attorney General. Only Peterson and one other assistant were so authorized. This is not a case of indiscriminate signing of authorizations. The Attorney General had personally approved the order in question. Any authorization letter, bearing Will Wilson's name could only have been signed by one of two persons. Thus, responsibility for the application's approval or denial can be fixed at any stage of its transmittal.

This court only recently had occasion to address the issue of compliance with the authorization provisions of the wire tap act. In *United States v. Giordano*, Nos. 72-1399, 72-1407, September 13, 1972, we held that where neither the Attorney General nor the Assistant Attorney General had actually authorized the applications the provisions of the Act had not been complied with. In *Giordano*, "neither Mitchell nor Wilson had heard of the Giordano application or signed the letters bearing their respective initials and signature." *Giordano*, slip opinion at p. 5. The opinion further stated:

> "Most other courts (citations omitted) have followed another approach in deciding the issue of compliance with 2518(1)(a) and 2518(4)(d). These courts have said that once the government has proved that Mitchell properly authorized the initial application, the fact that the Judge might have been told that Will Wilson rather than Mitchell was the source of the authorization was a matter of form, not substance. But here, there was no proper authorization at all. Neither Mitchell nor Will Wilson — nor any Assistant Attorney General for that matter — authorized the Giordano wiretap applications.
>
> "Perhaps it can plausibly be argued that when an application is properly authorized and only the identity of the source is mistakenly transmitted to the judge, he would have authorized the wiretap had he known the real facts. But where in the first place there is no proper authorization, this argument is unavailable." *Giordano* slip opinion at p. 19.

In this case, unlike *Giordano*, the Attorney General personally initialed a memorandum approving the specific wiretap authorization here questioned. The fact that Mitchell himself had approved the request was made known to the judge to whom the application was made. (Appendix, Vol. I, Sec. IB.) As previously mentioned, the authorization which finally left

the Attorney General's office bore the name of Will Wilson. Wilson, however, did not sign his name; it was placed there by Peterson, one of the two men who were authorized to sign for Wilson in the event Mitchell personally approved the wiretap authorization. We are of opinion that where, as here, a Deputy Assistant Attorney General, specifically authorized, signs the Assistant Attorney General's name, and the Attorney General specifically authorizes the application, there has been sufficient compliance with §§ 2516 and 2518 of the Act. See also *United States v. Cox*, supra; *United States v. Becker*, 461 F(2d) 230 (2nd Cir. 1972).

Accordingly, we reject appellants' contentions relating to the wiretaps in this case.

II

Appellants contend that the district court should have dismissed Count I as being an unindictable conspiracy. Count I charges a conspiracy to violate 18 USC § 1955 which makes it a violation to conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business. To be in violation of the Act, the gambling business must, among other things, involve five or more persons. There is no special significance to the number five other than representing a policy decision by Congress to exclude small operations from the coverage of the statute. The gist of appellants' argument is that the indictment, in effect, charges a conspiracy to conspire. To support their allegation, appellants cite a common law principle known as the Wharton rule. The essence of the rule follows:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents can not be maintained." 2 Wharton, Criminal Law, §1604, at 1862 (12th Ed. 1932).

The rule has been discussed by the Supreme Court, e.g., *Pinkerton v. United States*, 328 US 640 (1946), and various circuit courts, including the Fourth Circuit. *Lisansky, et al v. United States*, 31 F(2d) 846 (4th Cir. 1929); *Curtis v. United States*, 67 F(2d) 943 (10th Cir. 1933). The cases[8] decided on the issue of what constitutes an unindictable conspiracy reveal that Wharton's rule, rather than being a rule, is a concept, the confines of which have been delineated in widely diverse fashion by the courts. Practically the only point of agreement among the cases which have considered the issue is the validity of the rule as applied to the crimes listed by Wharton in enunciating the rule. Those were: dueling, bigamy, incest and adultery. The boundaries of the rule have been narrowly drawn in this circuit. In *Lisansky v. United States*, 31 F(2d) 846 (4th Cir. 1929), the opinion reads as follows: (quoting 5 R.C.L. 1072)

"The principle is confined within very narrow limits. It applies where the immediate effect of the act in view, which is the gist of the offense, reaches only the participants therein; and is in such close connection with a major wrong as to be inseparable from it. * * * It is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that the separation of the whole into its constituent elements and a prosecution for each as a distinct offense would place the parties twice in jeopardy, that the rule applies."

Before proceeding further, we should note the presence of notions of double jeopardy and merger in the quote from Judge Parker's opinion. Under the early common law, a conspiracy was said to merge with the completed felony which was its object and it was improper to separate the offenses for the purpose of prosecution. It is now, however, settled in the federal courts that prosecution for conspiracy, as well as for the commission of the substantive offense, is permissible, offending neither the principles of merger nor double jeopardy. *Pinkerton v. United States*, 328 US 640, (1946); *Callanan v. United States*, 364 US 587 (1961). According to the Supreme Court, "the common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country." *Pinkerton*, supra, at 643. Thus, to the extent that Wharton's rule was or is founded upon the concepts of double jeopardy or merger, it must be viewed as having no vaiidity.

This circuit's enunciation of the rule was further limited in *Old Monastery Co. v. United States*, 147 F(2d) 905 (4th Cir. 1945);

> "Usually the principle is applied to situations in which the concurrence (or agreement) and the substantive crime (or consummated offense) are so intimately and so closely connected that they in reality constitute a single act. Adultery is frequently cited as probably the clearest of such cases. But, as Circuit Judge Parker pointed out, this principle is to be confined to very narrow limits.
>
> "When, therefore, as in the instant case, the conspiracy embraces not merely the necessary parties to the illegal sale, the seller and the buyer, but other conspirators as well, we think that Monastery's altogether technical contention is of no avail. In Clark & Marshall, supra, the rule is

thus stated:

"If, however, the contemplated crime be one of which concert or consent is a constituent part, such as fornication, adultery, bigamy, incest and the like, the *mere agreement or accord if the parties to the offense* cannot be so separated from the offense itself as to support an indictment for conspiracy." [Italics ours.] Then, in a footnote to this statement, it is said: "But the implication of a third person will make it a conspiracy . . . ."

In *Pinkerton*, supra, the Supreme Court commented on the Wharton rule as follows:

"There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. [Citations omitted] But these exceptions are of a limited character."

We are of opinion that the following elements must coexist or else the rule may not apply: the immediate effect of the act in view, which is the gist of the substantive offense, reaches only the participants therein; the agreement of the participants is necessary for the completion of the substantive offense; and the conspiracy must be in such close connection with the substantive offense as to be inseparable from it.

Remembering that the assignment of error is that the conspiracy charged is an unindictable offense, we then apply the principles just above stated to the indictment here in question. A violation of § 1955 necessarily affects the great number of persons who place bets with the gambling business involved and with whom the gambling business involved places

bets. Many persons may be reached in the immediate effect other than the participants in either the gambling business or the conspiracy. A gambling business, the operation of which is made unlawful by § 1955, may be operated without the agreement of the minimum of five persons involved. The five persons need make no agreement; all they need to be is involved. The conspiracy charged here is not in such close connection with the operation of the gambling business as to be inseparable from it. Two persons, for example, could conspire to manage, conduct, finance, etc., an unlawful gambling operation as defined in the statute. Such persons indicted for conspiracy might very well be separate and apart from the five or more persons involved in the gambling business itself.

We are accordingly of opinion that the Wharton rule is not applicable to the indictment in this case. Accord *United States v. Benter*, 457 F (2d) 1174 (2nd Cir. 1972; *United States v. Becker*, 461 F (2d) 230 (2nd Cir. 1972); *United States v. Mainello*, 345 F.Supp. 863 (E.D. N.Y. 1972); contra, *United States v. Greenberg*, 334 F. Supp. 1092 (D. Ohio, W.D. 1971); *United States v. Figueredo*, 12 Crim. L. Rptr. 2253, (M. D. Fla., Nov. 20, 1972).

III

Appellants contend that the trial court erred in charging that six defendants had pleaded guilty. The pertinent part of the charge is:

"Six of the defendants . . .as you have previously been advised have entered pleas of guilt to various violations of certain federal gambling laws, and are not on trial in this

case.

"The five remaining defendants. . .are on trial; and it will become ultimately your duty to determine the respective defendants on trial guilt or innocence as to the specific charges remaining in the indictment on which they stand indicted. Not all of the defendants are charged in the two remaining counts.

"The fact that some defendants have seen fit to enter pleas of guilt gives rise to no inference of any defendants' guilt now stands on trial, and does not relieve the government in any wise of its burden under the law of proving the guilt of each individual defendant as charged in the specific counts that will be submitted to you, of proving the guilt of an individual defendant from the evidence in the case and beyond a reasonable doubt."

The government had indicted eleven persons under Count I, yet only five were on trial. The government explains that more were indicted to be sure they met the five or more requirement of 18 USC § 1955. It was not unreasonable for the court to explain who was on trial and who was not. In view of the limiting instruction which was given, we do not think the action of the trial court was so improper as to require reversal. We also note that the trial court, without objection, at the beginning of the trial, had given the jury a preliminary charge in similar language. The unexplained deferral of the defense objection until the end of the trial does not add to its weight.

IV

Appellants have lodged objections to those portions of the charge regarding the elements of the substantive offense contained in 18 USC § 1955. We note at the outset that the

statute contains its own definition of "illegal gambling business" and the court charged the jury at least twice in the exact language of the statute. He further charged the jury that the word business should be given its normal customary meaning. The act itself defines illegal gambling business as a gambling business which, among other things not pertinent here, "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." In spite of the fact that the statute limits itself to cases involving five or more persons and the court so instructed the jury, appellants contend that the language of the charge was so broad that the jury may have believed that they could convict even if each defendant were in business only for and by himself. We do not think any reading of the instructions would support the construction urged by appellants. Even beyond the language of the statute, the court told the jury that a business enterprise usually involves a continuing course of conduct; that persons could be in business *together* even though they did not work under the same roof; and that defendants may conduct their activities at great distances from each other and still be part of an *overall organization*, that *organization* being a business directed toward some business or end. The judge further charged: "Consider whether the defendants had a *common purpose in their dealing with each other.* . . . ." [Emphasis added.] We think the trial court more than adequately conveyed the idea to the jury that the government had to establish a single business rather than merely a number of unrelated individual businesses.

All appellants, except Gray, contend that appellant Gray's request number sixteen should have been granted. Gray's request recites the statutory language (which was charged on

numerous occasions), except the request used "and" instead of "or," requests separate definitions of certain words, and requests the jury be charged the words be given their "plain and ordinary" meaning. The judge, as above mentioned, told the jury to give the term business its normal customary meaning, so that part of Gray's charge number sixteen was substantially given. If the substance of a requested charge is given, the refusal to use the very words is not error. *United States v. Johnson*, 337 F (2d) 180 (4th Cir. 1964), aff'd., 383 US 169, 15 L.Ed. (2d) 681, 86 S.Ct. 749. The trial judge defined the word "conducts" in the words of House Report No. 91-1549, U. S. Code and Congressional News Service, 91st Cong., 2nd Sess., Vol. 2, p. 4029. He declined to define the words "finance," "manage," "supervise," "direct," or "own" in the very restrictive definitions sought by appellants. Instead of offering definitions of such words in their "plain and ordinary" meanings, appellants offered instruction substituted into, and grafted onto, *Webster's* definitions, until, other than "own," the "plain and ordinary" meaning of the words was submerged in argument. "Own" is such a common word that no definition is required. In addition, charge sixteen sought to charge the jury the above descriptive words must have existed in the conjunctive before a finding of guilt could result, while the statute uses the disjunctive "or." So, the charge as offered was quite properly refused in any event.

The only other objection to the charge of any consequence is that the trial court, at one point in the charge, used the word "participate." Appellants object to only one use of the word in a forty-four page charge. The court used the word in the following context:

"Next the government would have to establish that five or

more persons participated in such business knowingly, willfully, and intentionally performing acts and causing to be performed acts either to conduct, finance, manage, supervise, direct, and control all or part of said business."

Appellants' objection stems from the fact that Congress deleted the word "participate" from the original wording of the statute. The legislative history shows that the language was deleted because the word "participate" might be construed so as to include mere bettors in making up the statutory five persons required for a conviction under the Act. The language "involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business," was used instead of "participate." See *Hearings, Subcommittee* No. 5, *Committee on the Judiciary*, House of Representatives, 91st Cong., 2nd Sess, Ser. No. 27, p. 191. Taken in the context in which it was used, the word "participate" on the charge is unobjectionable. The judge did not use it in lieu of the statutory language, but in addition to it. One who conducts, finances, manages, supervises, directs or owns certainly participates. The use of the word in the charge was not as an element of the crime but by way of explanation of the elements which must be proved. And the court listed all of the elements in the statute. The trial judge had made it clear on numerous occasions what was required for a conviction and specifically charged twice that a mere bettor would not suffice. We are of opinion that the court's use of the word "participate" was quite proper in that its use in conjunction with the statutory elements of the crime was by way of explanation and in fact was a further restriction on the criminal liability of defendants. Accordingly, we find no merit to this contention.

V

The sufficiency of the evidence is also challenged. McEwen, Goldberg and Bobo contend that the evidence was insufficient to sustain a jury finding that there was an illegal gambling business involving five or more persons. Bobo contends that he ran a business separate and apart from Gray, who was the one who actually used interstate telephone facilities, and that he had no knowledge that Gray was using such facilities.

With regard to both of these allegations, it is well to note that the standard for appellate review of the sufficiency of the evidence is that a guilty verdict "must be sustained if there is substantial evidence, taking the view most favorable to the government, to support the findings of guilt." *United States v. Sherman*, 421 F (2d) 198, 199 (4th Cir. 1970). It is also well settled that circumstantial "evidence may support a verdict of guilty, even though it does not exclude every reasonable hypothesis consistent with innocence." *United States v. Gilmore*, ——F(2d)—— (4th Cir. No. 72-1529, Aug. 28, 1972).

With regard to the first contention, we note that illegal organizations must be, by their very nature, clandestine. They do not file articles of incorporation, execute partnership agreements or provide written contracts for the perrusal of government agents. Proof of their existence necessarily involves, to a great extent, the utilization of circumstantial evidence. Appellants' theory is that only one inference may be drawn form the facts, that being that the bookmakers in this case ran strictly individual businesses and that the co-operation between them was not enough to come under the statute. The jury, however, chose not to accept such theory,

and the issue here is whether there is evidence to support the theory accepted. The government contended that the seemingly independent operations had, in effect, joined together in an overall business, the purpose of which was to enhance individual profits, share the individual risks and eliminate competition in certain respects. A review of the extensive record in this case convinces us that there is substantial evidence to support a finding of guilt consistent with the government's theory. The basic operation of the bookmaking schemes in this case was explained in the initial factual statment of this opinion. The evidence established beyond question that the defendants maintained constant communications between themselves, laying off[9] bets with one another to balance their books on an almost day to day basis. They also exchanged line information regularly. By using the same line, they could prevent outsiders from playing them against each other, which was what they were frequently doing to other bookmakers. Without Bobo in Spartanburg and Porter in Greenville, Gray could not have developed his system which required access to at least two lines in different locations. Bobo, in turn, laid off bets with Gray. They all laid off bets with each other in order to achieve the goal of balanced books essential to a bookmaking system without risk of loss. Moreover, the government's proof did not show only isolated incidents and contacts; the evidence showed a regular, consistent course of conduct. We believe the evidence, viewed as it must be at this stage of the proceedings, amply supports the government's theory that appellants' mutually advantageous association constituted an illegal gambling business within the meaning of 18 USC § 1955.

With regard to Bobo's contention that the evidence is insufficient to support his conviction of violation of 18 USC

§ 1952, we likewise affirm the jury's guilty verdict. Bobo argues that Gray was the one who actually used interstate telephone facilities. The facts set out in the first part of this opinion and immediately above show that the closest connection in this case was between Gray and Bobo. The evidence is overwhelming that they were working together. After enjoying the fruits of Gray's labor over interstate telephone lines, Bobo cannot be heard now to eschew the burdens. It is inconceivable that Bobo could not have known that Gray was making interstate calls. On at least six occasions, Gray and Bobo discussed the "man up there," what Gray was getting from "up the road," and many times the calls to Bobo would be just after or just before a call to the "man" or "up there" and the parties would mention the call. True, the man "up there" could have been in South Carolina, but in view of Gray's association with New York bookmakers, we find the jury's conclusion beyond challenge at this point. In our view, the evidence is sufficient to support the verdict of guilty.

VI

Gray contends that he is a mere bettor with a system and not a bookmaker. That the jury's verdict that Gray was not a mere bettor should not be set aside has been previously discussed, and nothing would be added by further exploration of that point.

VII

Lastly, Gray contends that he was denied a fair and impartial trial on account of the tactics of the government during the trial in the prosecution of the case; that a tape

recording which was seized during a gambling raid was improperly introduced into evidence; and that the United States Attorney improperly interjected a personal opinion into his closing argument.

We are of opinion that the tape recording was properly identified as having been made during the period of the conspiracy and was properly introduced into evidence. It was found in Gray's home. See *United States v. Fuller*, 441 F(2d) 755 (4th Cir. 1971). The opinion of the United States Attorney expressed in argument, which should be avoided, was no more than stating a contention. While we do not believe it was improper in the context in which it was used, if improper, it was not so prejudicial as to require reversal, particularly in the absence of either timely objection or motion for mistrial. *United States v. Browning*, 390 F(2d) 511 (4th Cir. 1968).

The United States Attorney vigorously and skillfully prosecuted the case, as was his obligation, but his tactics were not unfair. We note the case was also vigorously defended.

We have considered all the various points raised on appeal and are of opinion they are without merit. The convictions are

AFFIRMED.

FOOTNOTES

1. In other words, if a player or customer bets one hundred dollars with a bookmaker on a specific athletic contest, he stands to lose the entire $100, but if he wins the bet, he may only win $90. The 10% overage which the bookmaker takes is termed vigorish. A bookmaker thus can win 10% of the total bets placed with him by balancing his books by taking equal amounts of money on the favorite and underdog, using the same line.

2. The Act also provides for State procedures which follow State enabling legislation not now before the court.

3. The Act permits orders which do not automatically terminate on a specified date upon a detailed showing of probable cause to believe that the same type of communications will occur thereafter. In no event may the same order run for longer than thirty days.

4. The Act contains other provisions which need not be detailed here, including safekeeping of the recordings, disclosure to the accused at least ten days prior to trial, and reports which must be made by the judge and the investigative agency.

5. *United States v. Cox*, 449 F(2d) 679 (10th Cir. 1971), cert. den. 406 US 934, 92 S.Ct. 1783, 31 L.Ed.(2d) 136 (1972); *United States v. Cox*, 462 F(2d) 1293 (8th Cir. 1972); *United States v. Focarile*, 340 F.Supp. 1033 (D.C. Md. 1972); *United States v. LaGorga*, 336 F.Supp. 190 (W.D. Pa. 1971); *United States v. King*, 335 F.Supp. 523 (S.D. Cal. 1971); *Unites States v. Becker*, 334 F.Supp. 546 (S.D. N.Y. 1971); *United States v. Lawson*, 334 F.Supp. 612 (E.D. Pa. 1971); *United States v. Perillo*, 333 F.Supp. 914 (D. Del. 1971); *United States v. Leta*, 332 F.Supp. 1357 (M.D. Pa. 1971); *United States v. Scott*, 331 F.Supp. 233 (D.C. 1971); *United States v. Cantor*, 328 F. Supp. 561 (E.D. Pa. 1971); *United States v. Sklaroff*, 323 F.Supp. 296 (S.D. Fla. 1970). One district court has held that the Act, because of the discretion given the judge, is unconstitutional because it would conceivably permit a judge to enter an order in contravention of the Fourth Amendment. *United States v. Whitaker*, 343 F.Supp. 358 (E.D. Pa. 1972). See also the dissent to the denial of certiorari in *United States v. Cox*, 405 US 934.

6. Extensions are subject to additional scrutiny not present in the New York Act.

7. No objection is made to any formal aspect of the application or order other than as discussed below.

8. *Pinkerton v. United States*, 328 US 640 (1946); *United States v. Katz*, 271 US 354 (1926); *Gebardi v. United States*, 287 US 112 (1932); *United States v. Benter*, 457 F(2d) 1174 (2nd Cir. 1972); *United States v. Becker*, 461 F(2d) 230 (2nd Cir. 1972); *United States v. Smolin*, 182 F(2d) 782 (2nd Cir. 1950); *United States v. Sager*, 49 F(2d) 725 (2nd Cir. 1931); *Old Monastary Co. v. United States*, 147 F(2d) 905 (4th Cir. 1945); *Lisansky v. United States*, 31 F(2d) 846 (4th Cir. 1929); *Chadwick v. United States*, 141 F 225 (6th Cir. 1905); *United States v. New York Central & R.R. Co.*, 146 F 298 (Cir. Ct. S.D. N.Y. 1906); *United States v. Dietrich*, 126 F 659 (Cir. Ct. D. Neb. 1904); *Thomas v. United States*, 156 F 897 (8th Cir. 1907); *United States v. Greenberg*, 334 F.Supp. 1092 (D.Ohio, W.D. 1971); *United States v. Mainello*, 345 F.Supp. 863 (E.D. N.Y. 1972); *United States v. Ianelli*, 339 F.Supp. 171 (W.D. Pa. 1972); *United States v. Figueredo*, 12 Crim. L. Rptr. 2253, (M.D. Fla., Nov. 20, 1972).

9. When a betting person has more money bet on a participant than he wishes, he transfers all or a part of the bet to someone else. This is called laying off.

APPENDIX B—ORDER DENYING PETITION FOR REHEARING

Nos. 71-2077
71-2078
71-2079

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN JACOB BOBO, JACK M. GRAY, WILLIAM DUWARD McEWEN and PAUL GOLDBERG,

Appellants.

ORDER

The court has considered the petition for rehearing and the suggestion for a rehearing en banc.

It appears to the court that one of thedefendants in the district court, Porter, was not convicted on thesubstantive charge as recited in the opinion, but rather as a conspirator which con-

viction was not appealed. We are of opinion such change of fact will not change the disposition of the case.

The court has considered the petition for rehearing and, in the absence of a request for apoll of the court, as provided by FRA pp. P 35(b), is of opinion that the petition for rehearing is without merit.

It is accordingly ADJUDGED and ORDERED, with the concurrences of Judges Haynsworth and Boreman, that the petition shall be, and it hereby is, denied.

s/
For the Court

APPENDIX C—ORDER OF DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

UNITED STATES OF AMERICA,

v.

JACK M. GRAY, ARTHUR SEGAN, JOHN JACOB BOBO, LESTER EUGENE KIRKLAND, THOMAS LYNN PORTER, WILLIAM DUWARD McEWEN, PAUL GOLDBERG,
Defendants,.

This matter was remanded by the Fourth Circuit in order for this Court to consider the appellant's motion for a new trial.

The movants question the validity of the authorization of the application for the wiretap in this case. The authorization provision, 18 U.S.C. 2516 (1), reads in pertinent part as follows:

> The Attorney General, or any aAssistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judege of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the intereception of wire or oral communications...

Affidavits before this Court reveal that the formal request for authorization to apply for a wire interception order in this matter was made by the Director of the Federal Bureau of Investigation on December 2, 1970. The request was then forwarded to the Criminal Division of the Justice Department, where it was subjected to intensive review. The Criminal Division approved the request and forwarded it to the office of the Attorney General with a written recommendation that the request be approved. The request was then reviewed by the Attorney General's Executive Assistant, Sol Lindenbaum, who transmitted the request to the Attorney General with Lindenbaum's recommendation.

In his affidavit dated April 4, 1972, the Attorney General states that on December 3, 1970, he approved a request for authority to apply for an interception order in this case and personally initialed a memorandum [1] of that date reflecting his favorable action on the request. [2] The Attorney General stated that the memorandum of approval in this case constituted a notification to Will Wilson, the Assistant Attorney General of the Criminal Division, that the discretionary action of approving the request to make application to theCourt was taken by the Attorney General. [3] The Attorney General stated that he had examine the original of this memorandum and certified that it bears his initials which were personally affixed on December 3, 1970. [4]

Following approval in the office of the Attorney General, the Criminal Division dispatched a letter dated December 3, 1970., to the United States Attorney for South Carolina, advising him

that he was authorized to present the application to the Court. The name of Will Wilson, then Chief of the Criminal Division, was signed to the letter by a deputy assistant attorney general, Henry Peterson, who was authorized to sign Wilson's name.

The movants rely on the January 12, 1972, decision of the Fifth Circuit in *UnitedStates v. Robinson,* No. 71-1058, —— F.2d ——. The affidavits presented by the government in that case revealed that the Executive Assistant to the Attorney General was approving actions specially designating an assistant attorney general to authorize the application to a judge for wiretaps. In this case, the affidavits furnished by the government present a different picture from those before the Fifth Circuit

This Court concludes, that the facts in this case are more similar to the facts in the April 7, 1972, decision of the Second Circuit in *U.S. v. Pisacano,* —— F. 2d ——. Three recommended authorizations were at issue before the Appeals Court, dated respectively July 30, August 12 and August 27, 1970. The August 12 and August 27 requests were approved by the Attorney General himself, in the first case by his initialling a memorandum, and in the second by specific telephone authorization to Mr. Lindenbaum to do so. The Second Circuit held that "clearly these complied with § 2516(1), no matter how strictly read."[5]

This Court holds, as was held by the Second Circuit, that the initialling of a memorandum reflecting his favorable action on the request by the Attorney General complied with ÷2516(1).

Movants further allege that the authorizations in this case were invalid in light of 28 USC § 2518(a) and (4)(d') which requires that the application and the court order indicate the officer authorizing the application.

Affidavits presented by the Government reveal that Will Wilson was identified as the authorizing officer when, in fact, the Attorney General had personally approved the applications.

Chief Judge Friendly in footnote five of his opinion in *United States v. Pisacano, supra,* stated:

> (hH)aving concluded that the Justice Department procedures were very likely consistent with the mandate of § 2516(1) we would not be inclined to rule that the authorizations were nevertheless invalid in light of 28 USC(1)(a) and (4)(d).... The legislative history indicates the purpose of both subparagraphs (1)(a) and subparagraph (4)(d) of § 2518 was simply to ensure that responsibility be fixed.... Perhaps the procedure adopted by the Justice Department was not the best for ascertaining theofficial who exercised the responsibility for authorizing applications as prescribed in § 2516(1) ; but as evident from this case, that procedure does nevertheless ensure that the responsible official be reasonably identifiable.

This Court is in accord with the Second Circuit's holdings that the Attorney General's personal authorization of the request for an application for a wire interception was not invalid in light of section 2518(1)(a) and (4)(d). The legislative history clearly

reveals that the purpose of section 2518 (1)(a) and (4)(d) was to have lines of responsibility lead to an identifiable person. [6] Section 2516 restricts the "identifiable person" to two officials, the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Even though an assistant attorney general was identified as the authorizing officer, the lines of responsibility still ran to the Attorney General. Accordingly,

IT IS ORDERED. that the motion for new trial be denied. Let a copy of this order be served on the parties and also filed with the Clerk of the Fourth Circuit Court of Appeal at Richmond, Virginia.

s/ J. Robert Martin, Jr.
United States District Judge

Greenville, S.C.
May 19, 1972

FOOTNOTES

1. The original memorandum of December 3, 1970, and the original affidavit of April 4, 1972, were furnished by the Government and movants were allowed ten (10) days to examine them or have their handwriting experts examine them.

2. In this affidavit of February 18, 1972, the Attorney General states that he chose not to designate an Assistant Attorney General to authorize applications for wire interceptions without the Attorney General's approval. The Attorney General required that all request be considered by him. This procedure was intended to centralize in him the responsibilities for a control of Justice Department policy in relation to Title III of the Omnibus Crime Control and Safe Street Acts of 1968.

3. The memorandum of December 3, 1970, states the following:

TO: Will Wilson
Assistant Attorney General
Criminal Division

Date: Dec. 3, 1970

JNM:JHS:skh

From:
John N. Mitchell
Attorney General

SUBJECT:
Interception Order Authorization

This is with regard to your recommendation that authorization be given to Joseph O. Rogers, Jr., United States Attorney, District of South Carolina, to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a fifteen (15) day period to and from telephone numbers 244-0928 and 244-0966, located at 815 Edwards Road, Apartment 26, Willimsburg Manor, Greenville, South Carolina, and telephone numbers 583-2503 and 583-9871, located at 955 Howard Street, Spartanburg, South Carolina, and telephone numbers 723-6010 and 723-6420 located at 476 King Street, Charleston, South Carolina, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1084, 1952 1955, 2, and 371 by Jack M. Gray, John Jacob Bobo, William Duward McEwen, Charles Smith, Paul Goldberg and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Joseph O. Rogers, Jr., to make the above-described application.

4. The affidavit of Sol Lindenbaum, Executive Assistant to the Attorney General, states that the Attorney General personally initialed the memorandum of December 3, 1970.

5. As to the July 30 authorization, Mr. Lindenbaum affixed the Attorney General's initials on the basis of his conclusion, stemming from his knowledge of the Attorney General's actions on previous cases that he would approve the request if submitted to him. The Second Circuit held that this procedure conformed with the letter of §2516(1).

6. 1968 U.S. Code Cong. & Adm. News 2112, 2185.

APPENDIX D—LETTER FROM WILL WILSON DATED DECEMBER 3, 1970

(Letterhead of Assistant Attorney General, Criminal Division, Department of Justice, Washington 20530.)

DEC 3, 1970

Mr. Joseph O. Rogers, Jr.
United States Attorney
District of South Carolina

Dear Mr. Rogers:

This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the Court authorizing the Federal Bureau of Investigation to intercept wire communications to and from telephone numbers subscribed to by Jack M. Gray and located in premises at 815 Edwards Road, Apartment 26, Williamsburg Manor, Greenville, South Carolina, and carrying telephone numbers 244-0928 and 244-0966 and the telephones located in premises at 955 Howard Street, Spartanburg, South Carolina and carrying telephone numbers 583-2503 and 583-9871 and subscribed to by Thomas D. Steadman, and the telephones subscribed to by Uptown Sports Center, and located in premises 476 King Street, Charleston, South Carolina and carrying telephone numbers 723-6010 and 723-6420, in connection with the investigation into possible violations of Sections 1084, 1952, 1955, 2, and 371 of Title 18, United States Code, by Jack M. Gray, John Jacob

Bobo, William Duward McEwen, Charles Smith, Paul Goldberg and others as yet unknown.

I have reviewed your request and the facts and circumstances detailed therein and have determined that probable cause exists to believe that Jack M. Gray, John Jacob Bobo, William Duward McEwen, Charles Smith, Paul Goldberg and others as yet unknown have committed, are committing, or are about to commit offenses enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Sections 1084, 1952, 1955, 2, and 371 of Title 18, United States Code. I have further determined that there exists probable cause to believe that the above persons make use of the above-described facilities in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.

Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications from the facilities described above, for a period of fifteen (15) days.

Sincerely,

s/ Will Wilson
WILL WILSON
Assistant Attorney General

APPENDIX E—AFFIDAVIT OF WILL WILSON SWORN TO SEPTEMBER 15, 1971

District of Columbia:

Will Wilson, Assistant Attorney General of the United States, being duly sworn, states:

I am Assistant Attorney General in charge of the Criminal Division of the United States Department of Justice and have been since January 1969.

I have authorized Deputy Assistant Attorney General Henry E. Petersen and Deputy Assistant Attorney General Harold Shapiro to sign my name to letters of authorization for application to United States District Courts for orders under Title 18, United States Code, Section 2518, after such application had been approved by the Attorney General.

The letter authorizing William G. Earle to make an application to the court for an interception order with respect to certain telephones commonly used by Martin and Jesse Sklaroff at Miami International Airport was signed for me by Mr. Petersen pursuant to my authorization. A copy of the carbon copy of this letter presently in the files of the Department of Justice is attached as Exhibit 1.

s/ Will Wilson
WILL WILSON
Assistant Attorney General
Criminal Division

Subscribed and sworn to before me
this 15th day of Sept., 1971.
s/ Audrey Ann Crump
My Comm. Expires 8/31/76

Mr. William G. Earle
Post Office Box 4139
160 Northeast Fourth Street
Miami, Florida

Dear Mr. Earle:

This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18, United States Code, for an Order of the court authorizing the Federal Bureau of Investigation to intercept wire communications to and from four pay telephones at the Miami International Airport near the entrance to Concourse 2 between United and Northwest Airlines counters, carrying phase numbers 691;9981, 691-9566, 961-9797, and 691-9528.

I have reviewed your request and the facts and circumstances detailed in the affidavit of Special Agent Edwin J. Sharp and have determined that probable cause exists to believe that Martin Sklaroff, Jesse Sklaroff, and others are engaged in the commission of an offense enumerated in Section 2516 of Title 18, United States Code, to wit: violations of Section 1084 of Title 18, United States Code, and a conspiracy to violate this statute. I have further determined that there exists probable cause to

believe that the above persons will make use of the described facilities in connection with that offense, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures are unlikely to succeed or are too dangerous to be used.

Accordingly, you are hereby authorized under the power specially delegated to me in relation to the above described offenses by the Attorney General pursuant to the paper conferred on the Attorney General by Section 2516, Title 18, United States Code, to make application to a judge of competent jurisdiction for an order pursuant to Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications from the facilities described above.

Sincerely,
WILL WILSON
Assistant Attorney General

cc:
White (2)
The Attorney General
Wilson
Office Chrono

APPENDIX F—AFFIDAVIT OF HENRY E. PETERSEN SWORN TO FEBRUARY 15, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

UNITED STATES OF AMERICA,

v.

JACK M. GRAY, *et al.*

Henry E. Petersen, being duly sworn, deposes and says:

I am Assistant Attorney General in charge of the Criminal Division. At the times of the events related in this affidavit, I was a Deputy Assistant Attorney General in the Criminal Division, United States Department of Justice.

This affidavit describes the processing within the Criminal Division of the Department of Justice of the request for authorization to make application to a Federal Court for a wire interception order pertaining to certain telephones in Greenville, Spartanburg. and Charleston, South Carolina, which were involved in an investigation implicating Jack M. Gray and others.

Our file indicates that the formal request for authorization to

apply for a wire interception order in this matter was made by the Director of the Federal Bureau of Investigation on December 2, 1970. Prior to action on the request, the Department file, which included copies of the proposed affidavit, application, and order, was reviewed in a special Unit of the Organized Crime and Racketeering Section of the Criminal Division by attorneys whose primary function was to review the entire matter for form and substance with particular emphasis on assuring strict adherence to the required statutory judicial, and Constitutional standards. The attorney handling the matter, Joel Slomsky, and his supervisor, Philip T. White, of that Unit, reviewed the file and recommended favorable action on the request. The file was then submitted, in turn, for review to Kurt Muellenberg, a Deputy Chief of the Organized Crime and Racketeering Section, and to William S. Lynch, Chief of that Section, both of whom recommended approval. The file was then sent to me. I examine the file and forwarded it to the Office of the Attorney General with a detailed recommendation that the authorization be granted. Following approval in the Office of the Attorney General, the Criminal Division dispatched the letter dated December 3, 1970, to Joseph O. Rogers, Jr., advising him that he was authorized to present the application to the court.

I signed Will Wilson's name to the letter of December 3, 1970, in accordance with the authorization of Will Wilson and the standard procedures of the Criminal Division. I regarded the signing of Will Wilson's name as a ministerial act, because Will Wilson had authorized me to sign his name to and dispatch such a letter of authorization in every instance in which the request had been favorably acted upon in the Office of the Attorney

General. Will Wilson did not examine either file or expressly authorize either application. Attached is a copy of Will Wilson's affidavit of September 15, 1971, respecting an authorization letter dated June 16, 1969, in which he stated that he had authorized me to sign letters of this nature.

s/ Henry E. Petersen
HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

Subscribed and sworn to before me
this 15th day of February, 1972.
s/ Audrey Anne Crump
My Commission Expires August 31, 1976

APPENDIX G—AFFIDAVIT OF JOHN N. MITCHELL SWORN TO FEBRUARY 18, 1972

District of Columbia:

John N. Mitchell, being duly sworn, deposes and says:

I am the Attorney General of the United States and have been since January 1969.

Shortly after taking office, I determined to utilize the authority granted by Congress in 18 U.S.C. 2510-2520 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968) to conduct electronic surveillance under court authorization in the investigation of certain criminal activities.

I established a procedure whereby all requests for authorization to apply for wire interception orders are subject to intensive review in the Criminal Division of the Department of Justice and each of the requests in which the Criminal Division concurs is forwarded to me with a written recommendation of the Criminal Division that I approve it.

Although 18 U.S.C. 2516(1) permitted me, as Attorney General, to designate an Assistant Attorney General to authorize applications for wire interceptions without my approval, I chose not to make such designation, but rather to require that all requests for authority to file such applications be forwarded to me for consideration. This procedure was intended to centralize in me the responsibility for and control of the policies to be followed by the Department of Justice in relation to Title

III of the Omnibus Crime Control and Safe Streets Act of 1968.

All requests received in my office are reviewed by my Executive Assistant, Sol Lindenbaum. Except as otherwise indicated herein, Mr. Lindenbaum transmits the request and all accompanying papers to me, along with his recommendation. If I determine to approve a request, I indicate my approval by initialling a memorandum addressed to the Assistant Attorney General in charge of the Criminal Division. This memorandum recites that the Assistant Attorney General is "specially designated" to authorize the application. Upon receipt of my memorandum, a letter of authorization, over the name of the Assistant Attorney General, is dispatched to the applicant. The memorandum and the letter of authorization are part of the procedure developed for transmittal of my approval to the applicant. The memorandum constitutes a notification to the Assistant Attorney General of the Criminal Division that I have performed the discretionary act of approving the request.

Somewhat more than a year after this Department first utilized the provisions of Title III, I verbally authorized my Executive Assistant to act on my behalf on requests that might be transmitted by the Criminal Division at a time when I was not available to act on them. I gave him this authority in the light of his familiarity with my policies and with my decisions on all the requests that had been previously submitted to me. My subsequent review of cases in which he approved requests on my behalf confirmed that he followed my policies.

Since November 20, 1971, I have personally authorized all

applications for interception orders which have been presented to Federal judges pursuant to 18 U.S.C. 2516(1).

s/ John N. Mitchell
JOHN N. MITCHELL
Attorney General of the United States

Subscribed and sworn to before me
this 18th day of February, 1972.
s/ Audrey Anne Crump
My Commission Expires August 31, 1976

APPENDIX H—AFFIDAVIT OF SOL LINDENBAUM SWORN TO FEBRUARY 14, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

UNITED STATES OF AMERICA

v.

JACK M. GRAY, *et al.*

District of Columbia:

Sol Lindenbaum being duly sworn, deposes and says:

I am Executive Assistant to the Attorney General of the United States.

On December 3, 1970, the Attorney General approved a request for authorization to make application for an interception order with respect to certain telephones in Greenville, Spartanburg, and Charleston, South Carolina. Attached is a copy of the Attorney General's personally initialed memorandum of that date to Will Wilson reflecting his favorable action on the request.

s/ Sol Lindenbaum
SOL LINDENBAUM
Executive Assistant to the Attorney General
of the United States

Subscribed and sworn to before me
this 14th day of February, 1972.
s/ Audrey Anne Crump
My Commission Expires August 31, 1976

APPENDIX I-LETTER FROM JOHN N. MITCHELL DATED DECEMBER 3, 1970

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE
MEMORANDUM

To
Will Wilson
Assistant Attorney General
Criminal Division

DATE: DEC 3, 1970

From:
John N. Mitchell
Attorney General

Subject:
Interception Order Authorization

This is with regard to your recommendation that authorization be given to Joseph O. Rogers, Jr., United States Attorney, District of South Carolina, to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a fifteen (15) day period tc and from telephone numbers 244-0928 and 244-0966, located at 815 Edwards Road, Apartment 26, Williamsburg Manor, Greenville, South Carolina, and telephone numbers 583-2503 and 583-9871, located at 955 Howard Street, Spartanburg, South Carolina, and telephone numbers 723-6010 and 723-6420 located at 476 King Street,

Charleston, South Carolina, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1084, 1952, 1955, 2, and 371 by Jack M. Gray, John Jacob Bobo, William Duward McEwen, Charles Smith, Paul Goldberg and others as yet unknown.

Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing Joseph O. Rogers, Jr. to make the above-described application.

APPENDIX I—AFFIDAVIT OF JOHN N. MITCHELL SWORN TO APRIL 4, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

UNITED STATES OF AMERICA,

v.

JACK M. GRAY, *et al.*

District of Columbia:

John N. Mitchell, being duly sworn, deposes and says:

I held the office of Attorney General of the United States from January 21, 1969, through March 1, 1972.

On December 3, 1970, I approved a request for authority to apply for an interception order in this case and personally initialed a memorandum of that date reflecting my favorable action on the request. I have examined the original of this memorandum and certify that it bears my initials which were personally affixed by me on December 3, 1970. Attached is a copy of my personally initialed memorandum of that date reflecting my favorable action on the request.

My memorandum of approval in this case constituted a notification to the Assistant Attorney General of the Criminal Division that the discretionary action of approving the request to make application t the court for an interception order was taken by me.

s/ John N. Mitchell
JOHN N. MITCHELL

Subscribed and sworn to before me
this 4th day of April, 1972.
s/ Robert H. Huey
My Commission Expires Sept. 30, 1975

(Letter herein referred to is herein reproduced as Appendix I.)